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**VETERANS' ADMINISTRATION ADJUDICATION
PROCEDURE AND JUDICIAL REVIEW ACT**

**HEARING
BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE
NINETY-SEVENTH CONGRESS
FIRST SESSION
ON
S. 349 and Related Issues**

JULY 15, 1981

Printed for the use of the Committee on Veterans' Affairs



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VETERANS' ADMINISTRATION ADJUDICATION PROCEDURE AND JUDICIAL REVIEW ACT

WEDNESDAY, JULY 15, 1981

U.S. SENATE,
COMMITTEE ON VETERANS' AFFAIRS,
Washington, D.C.

The committee met, pursuant to notice, at 9:38 a.m., in room 412, Russell Senate Office Building, Hon. Alan K. Simpson (chairman of the committee) presiding.

Present: Chairman Alan K. Simpson (presiding), Senators Alan Cranston, Frank H. Murkowski, Arlen Specter, and Jennings Randolph.

Senator CRANSTON. The hearing will come to order. Senator Simpson has been delayed, so I will get the hearing started. Jennings, do you have any remarks?

Senator RANDOLPH. No, I believe not. I may ask a question or two, Mr. Acting Chairman, because I do need to go to another appointment, commitment. But I will wait.

Senator CRANSTON. I am very pleased to be here this morning for this hearing of the Committee on Veterans' Affairs to hear testimony on S. 349, the proposed Veterans' Administration Adjudication Procedure and Judicial Review Act, legislation which I introduced, together with my good friend from Colorado, Gary Hart, and my fellow committee member, Dennis DeConcini, earlier this year. S. 349 is identical to S. 330, as passed by the Senate in the last Congress.

We will also hear testimony on certain other issues related to the Board of Veterans' Appeals.

I am very pleased that the committee will be hearing testimony on the BVA today. Despite the best efforts of the members of our committee, and our counterparts in the House, I am not convinced that we are able to oversee the actions of the BVA with complete effectiveness. I welcome the further opportunity for oversight that today's hearings will provide.

I have a longer statement that sets forth in more detail my views on judicial review of final VA decisions.

At this time I simply want to note a few points regarding that position, and by unanimous consent my longer statement will appear in the record as if read in full.

First, my support for judicial review legislation is not predicated on the belief that the BVA routinely fails to resolve matters before it in a fair and evenhanded manner. Rather, I believe that veterans seeking VA benefits, like other individuals with claims for various benefits from other Federal agencies, should be provided with an

opportunity to have a denial of such claims reviewed by an entity separate from the VA.

One need not reach any conclusion about the quality of justice under the current system to conclude that providing outside review would eliminate any perceived injustice.

For that reason alone, I believe that permitting judicial review of final VA decisions on claims for benefits is appropriate.

I can find no basis for continuing to treat VA benefits as mere gratuities or gifts from the Government, unworthy of the protection provided by independent review. In short, I do not believe that the VA should be placed above the law, or veterans denied the protection of the law.

I also support judicial review legislation as an important check against administrative actions of dubious legal validity, designed to restrict benefits or exclude certain classes of veterans from eligibility for some benefits.

I detail some specific instances of this type of action in my longer statement, but the point is simple: With increased emphasis on reducing Federal spending, I believe that the VA will continue to curb some benefits administratively and that the congressional oversight process is not a sufficient check on this type of activity.

A veteran who is affected by such an administrative cutback should be able to challenge the validity of the action in court.

Finally, I support judicial review legislation because of my concern that the preclusion of court review in current law, and the VA's reliance on it, is too broad and in an appropriate case, this preclusion may well be struck down as unconstitutional. In recent years, particularly since the Supreme Court's decision in *Johnson v. Robison*, some significant inroads have been made on the bar to judicial review of VA decisions.

If this trend continues, culminating in a court decision striking down the entire bar to review on the grounds that it denies due process to claimants before the VA, it is entirely likely that the courts will, themselves, then proceed to establish new procedural safeguards in the agency's internal adjudication functions, thereby preempting the Congress from exercising its proper role of deciding what VA procedures and processes are needed to insure that veterans are treated fairly.

S. 349 is a good bill that reflects a significant effort to develop legislation to address the many issues involved while taking into account the concerns raised by persons and organizations knowledgeable on VA matters.

Although I have not been persuaded by any of the arguments I have heard against allowing judicial review, I continue to be willing to listen to all points of view on this issue and to work with the chairman and other members of the committee to develop the best legislation possible.

Al, thank you very much for letting me proceed.

Chairman SIMPSON. I appreciate your help.

[The prepared statement of Hon. Alan Cranston, ranking minority member of the Committee on Veterans' Affairs, follows:]

PREPARED STATEMENT OF HON. ALAN CRANSTON, RANKING MINORITY MEMBER OF
THE SENATE COMMITTEE ON VETERANS' AFFAIRS

Good morning. I am pleased to be here for this morning's hearing of the Committee on Veterans' Affairs to hear testimony on S. 349, the Proposed "Veteran's Administration Adjudication Procedure and Judicial Review Act", legislation that I introduced, together with my good friend from Colorado, Gary Hart, and my fellow Committee member, Dennis DeConcini, earlier this year, and on certain other issues related to the Board of Veterans' Appeals. S. 349 is identical to S. 330 as passed by the Senate in the last Congress.

I am very pleased that the Committee will be hearing testimony on the BVA today. Despite the best efforts of the members of our Committee and our counterparts in the House, I am not convinced that we are able to oversee the actions of the BVA completely effectively, and I welcome the further opportunity for oversight that today's hearing will provide.

I would like to outline for this hearing record in considerable detail my views on judicial review legislation and S. 349 in particular.

With the exceptions of insurance claims, housing program matters, and constitutional issues, veterans have been denied access to judicial review of determinations made by the Administrator of Veterans' Affairs since the enactment of the Economy Act of 1933, legislation which greatly limited veterans' benefits generally. Veterans, as a class, are the only recipients of major Federal benefits programs who are denied access to the courts after all administrative remedies have been exhausted. I strongly believe that this discrimination against veterans is inappropriate and unfair and that the current system fails to provide checks against arbitrary or capricious action by the agency, either with respect to determinations in individual cases or in the promulgation of regulations relating to benefits.

I. BASIC PURPOSE OF JUDICIAL REVIEW LEGISLATION

The basic purpose of S. 349 is to assure that veterans and other claimants before the VA receive all benefits to which they are entitled under law by providing them with the opportunity for judicial review of final decisions of the Administrator of Veterans' Affairs denying claims for benefits, by codifying certain internal procedures of the VA relating to the adjudication of benefit claims, by requiring that VA rulemaking processes comply with provisions of the Administrative Procedure Act relating to notice and comment, and by making it possible for veterans and other claimants to obtain the services of attorneys in pursuing their claims by allowing the payment of reasonable, limited attorneys' fees for services rendered after an initial denial.

II. NEED FOR LEGISLATION

A. Assuring fairness to individual claimants

I believe that the need for this type of judicial check on the system is clear. Both of the Veterans' Affairs Committees do their utmost to oversee and monitor the activities of the VA to ensure that veterans and their survivors and dependents receive the benefits to which they are entitled and that the programs are administered in a fair and effective manner. However, the Committees' limited resources do not allow them to review thoroughly every issue confronted by such a large and complex agency as the VA—which has an annual budget exceeding \$21 billion, employs over 215,000 people, pays cash benefits to over 6 million veterans and dependents each year, provides hospital, nursing home, and domiciliary care to nearly 2 million patients a year, and provides approximately 18 million outpatient visits annually—or even to attempt to assure that each individual claimant receives his or her due.

My decision to support judicial review legislation was not based on a belief that the current system resulting in final, unappealable decisions by the Board of Veterans' Appeals leads to widespread injustices—although there is significant evidence that injustices warranting court review do occur. Rather, my support is primarily based on concerns raised by a number of witnesses and commentators that, whatever the merits of the original statutory preclusion of judicial review in 1933, the view that veterans' benefits are mere gratuities and that veterans have no interest in or right to such benefits warranting the protection afforded by access to court review seems highly questionable at this time, particularly in light of the protections, including access to court, now provided most all other beneficiaries of Federal benefits.

In addition, the tremendous volume of applications for benefits that are processed annually by the VA and the many thousands of appeals taken from unfavorable decisions—61,097 in fiscal year 1979, of which 22.8 percent were allowed—suggests that there is a significant opportunity for some injustices to occur. Under the present state of the law, a veteran or other claimant aggrieved by a final VA decision is generally left without any further recourse.

The United States Court of Appeals for the District of Columbia Circuit decision last year in *DeMagno v. United States* (No. 79-1852, Sep. 24, 1980) clearly illustrates the susceptibility of the present system to erroneous factual determinations and denials of benefits and the plight of those who have no recourse in the courts. In that case, the dependency and indemnity compensation benefits of the widow of a veteran who had died as a result of a service-connected disability were declared forfeit, under section 3503(a) of title 38, United States Code, on the basis of a determination that, in September 1972, she had knowingly made a false, material statement for the purpose of enabling another claimant improperly to receive benefits. In December 1977, the Board of Veterans' Appeals affirmed the forfeiture, which was applied retroactive to the date of that statement. In order to collect the amount of the payments made between the dates of the statement and the determination in October 1973 to suspend her DIC payments pending an investigation, the VA decided to withhold that amount from Mrs. DeMagno's VA-administered life insurance benefits, which were not subject to forfeiture and to which the judicial-review bar does not apply. On the basis of a special provision—section 784 of title 38—providing for judicial review of certain VA-administered life insurance claims, Mrs. DeMagno filed suit in Federal district court, but the district court held that, under section 211(a), it lacked jurisdiction over both the forfeiture decision and the VA's decision to offset insurance benefits, and granted the Government's motion to dismiss.

The court of appeals reversed the district court's ruling and held that, when the VA takes affirmative action to recover a claim against an individual by court action or, as in this case, by set-off, "the validity of the underlying basis of the action becomes open to judicial scrutiny."

Addressing the factual basis for the forfeiture, the three-judge appellate panel found the determination that Mrs. DeMagno's statement was knowingly false to be totally unsupported by any evidence of record in her case. The panel's unanimous opinion stated:

"We have read and reread the administrative record and the briefs of the parties, and confess ourselves mystified at the action taken by the VA in this case. Either the VA is withholding, both from us and from deMagno, *all* evidence which would justify its conduct, or this woman has been the victim of wholly arbitrary administrative ineptitude, leaving her impoverished for nearly four years." (Emphasis in original; footnote omitted.)

The *DeMagno* case portrays several defects in VA adjudications and the unfairness of the general preclusion of judicial review of those proceedings. First, although the court of appeals found in Mrs. DeMagno's favor on the jurisdictional issue, the fact is that, but for the highly unusual situation involving a set-off against insurance payments—which only a tiny fraction of even survivors' benefits cases are likely to involve and no veterans' claim would involve—an obvious injustice would have been permitted to have been permanently done.

Second, if the law had not barred direct judicial review of the forfeiture determination, a much more timely judicial focus on the lack of evidence to support that determination would have been available at the trial court level and Mrs. DeMagno might not have suffered the erroneous denial of DIC and insurance benefits during most of the 34-month period between the BVA's denial of the appeal and the VA's decision, after receipt of the court of appeals opinion, to restore payment of Mrs. DeMagno's benefits.

Third, I consider three aspects of the administrative procedures followed in this case to be highly questionable—the suspension of Mrs. DeMagno's DIC benefits pending investigation, with no notice of or opportunity to respond to the allegation of fraud for a 10-month period; the statement—made in the letter ultimately notifying her of the allegation of fraud and her right to a hearing and discouraging her from exercising that right—that, if she had "no new evidence to present . . . , a hearing will serve no useful purpose"; and the BVA's express reliance on evidentiary materials in the case file of the other claimant that were not disclosed to Mrs. DeMagno and were even withheld by the VA in the proceedings in the Federal district court. I believe that the exposure of VA proceedings to judicial scrutiny would provide the most effective, ongoing means for insuring that the legality of such dubious practices receives the thorough examination that fairness to VA claimants requires.

Beyond the possibility of real injustices without a remedy, this Committee also developed judicial review legislation in order to address what some veterans, especially those whose claims for benefits are denied by the VA, perceive as a system with various inequitable features. The combination of no access to court review of the agency decisions coupled with a statutory limit of \$10 on the amount an attorney is permitted to receive for representing an individual with respect to a claim for benefits, which effectively precludes any meaningful non-legal-services attorney representation of veterans or other claimants in VA claims matters, has led many claimants over the years to believe that they have been relegated to second-class citizenship with respect to their claims for veterans' benefits.

Therefore, after reviewing all the various arguments and concerns relating to judicial review in 7 days of hearings over 3 years, this Committee concluded in the last Congress that providing an opportunity for those aggrieved by VA decisions to have such a decision reviewed by a court, in a manner similar to that enjoyed by claimants before almost all other Federal agencies, was necessary to provide VA claimants with fundamental justice. To continue to inform a claimant before the VA that a benefit to which he or she was entitled by law could be wrongly—indeed arbitrarily or capriciously—denied and that there is no recourse to remedy such a denial, no longer seemed a viable response. The legislation passed in the last Congress—S. 330—is identical with S. 349 that is now pending before the Committee.

In addition, the Committee believed that the provision of judicial review, by opening the decisions of the VA to court scrutiny, would have a salutary effect on such decisions and the VA's decisionmaking process in general by involving the judiciary as an outside check on agency actions. Although the VA has the unique and vital mission of providing service to our Nation's veterans and their survivors, it is, at the same time, a large and complex Federal agency, and providing the opportunity for an independent, impartial body, in the form of the Federal courts, to review the processes and procedures of the agency should provide fuller reassurance of fair treatment to those with claims or other matters before the VA. In short, I don't believe that the VA should be placed above the law—or veterans denied the protection of the law.

B. Review of questionable actions restricting benefits

I would also like to stress my belief that, in addition to providing veterans with the opportunity for review of administrative denials of their individual claims, judicial review legislation can serve as an effective barrier to administrative actions, of dubious legal validity, designed to restrict benefits or exclude certain classes of veterans from eligibility for some benefits. In these times of fiscal austerity and the resulting need to achieve economies in all Federal programs, I am concerned that pressures to reduce spending may in some instances produce executive branch actions—restricting, withholding or withdrawing a benefit—that are of questionable legality. It seems to me that the temptation to achieve savings through such possible illegal action may well be more appealing when the agency knows that court review is unavailable to question its activities.

Certain incidents that have occurred in the recent past illustrate this point. During fiscal years 1979 and 1980, certain aspects of VA activities funded through non-entitlement accounts were at times hard-pressed, and the Committee received reports of certain benefits—most frequently medications and medical supplies for VA outpatients and beneficiary travel reimbursements—being curtailed at various stations. In some cases, these benefits were reportedly withheld from service-connected disabled veterans.

The most striking incident in this regard was the decision of the Office of Management and Budget to require the VA to apply to VA beneficiary travel reimbursements the limitation under Public Law 96-86 on obligations for executive branch employee travel and transportation. At an April 16, 1980, hearing of the Committee, I asked the VA to provide us with a copy of whatever legal analysis had been made in support of the Administration's conclusion that the employee travel limitation was applicable to non-employee travel. No legal memorandum or other documentation in support of the conclusion was ever submitted. While that unsupported determination remained in effect, we received reports of stations that were expecting to run out of funds for beneficiary travel cutting back on reimbursements and, as a result, some eligible veterans being denied this benefit and others being unable to travel to a VA facility to keep appointments after being notified that they would not be reimbursed. Lacking recourse to the courts, the veterans affected and the organizations representing them were powerless to prevent this action.

A further example of the type of administrative action that demonstrates the need for judicial review occurred following the submission of the President's revised

budget in March 1980, in which it was proposed that the VA deny health care to military retirees for non-service-connected disabilities. Instead of waiting until the completion of Congressional action on fiscal year 1981 appropriations to implement this proposal, at least one VA Medical Center proceeded to put the proposal into effect. It seems unreasonable to me that an individual denied care as the result of this administrative action could not, after exhausting available administrative appeal processes, go to a court of law for a determination as to the legality of this administrative decision.

In another example, the VA's Department of Medicine and Surgery issued a directive—Circular 10-80-218—requiring that, in all cases in which medical care was provided during the past 3 years to non-service-connected veterans who are Federal employees with group health-insurance coverage, a review be undertaken to determine whether collection action should be pursued against the veterans concerned on the grounds that the oaths of inability to defray the costs of the care involved were falsely executed. In the agency's view, the receipt of VA care in such circumstances results in an indebtedness to the United States that should be collected from the veteran. Since VA-provided care is excluded from coverage under the health insurance policies involved, recoveries would be made from the veterans personally—from their non-insurance resources—and it was foreseeable that, in the cases of some veterans, collection would be made by way of offset against future payments of VA benefits, such as GI Bill and pension benefits, and even compensation in the case of a subsequently established service-connected disability. In such cases, the agency would make the factual determinations regarding ability to pay and the legal determinations regarding the existence of an indebtedness and the consequent requirement under section 3114 of title 38 to collect it by way of offset. In addition, under section 3301(g)(4) of title 38, the VA would have the option of disclosing to consumer reporting agencies—credit bureaus—for the purpose of adversely affecting the veteran's credit standing, information regarding what the VA may determine to be a delinquent indebtedness.

I am advised both that the legal underpinnings of the circular were open to serious question and that, if it were implemented, a veteran against whom such administrative collection actions were taken would probably be unable to obtain court review of the factual and legal determinations made adversely to him or her and of the administrative actions that I have described—including collection by offset or disclosure of information to consumer reporting agencies.

Fortunately, as the result of objections raised by the two Veterans' Affairs Committees and the veterans' service organizations, the VA withdrew the circular. However, the possibility exists that it may be reissued, and the point is that there should have been other recourse.

Regardless of what, if any, action is taken with respect to this circular and the other issues I've highlighted, the point I wish to stress remains—that the possibility of legally questionable measures being implemented administratively to realize cost savings at the expense of veterans exists and the availability of recourse to the courts could prove to be a highly desirable and effective check on such agency actions. In this connection, I would note that it is very conceivable to me that budgetary considerations may actually increase the pressures to take such steps.

In this connection, I would also note that, under section 4004(c), even the semi-independent BVA does not have the authority to question the legality of the regulations and instructions of the Administrator or the precedent opinions of the VA's General Counsel. Thus, in effect, the final arbiter of many legal issues relating to VA claims, including the legality of VA regulations (except with respect to constitutional questions), is the VA's General Counsel. I would note that that position of General Counsel is not an independent one and is not insulated by any statute, regulation, or organizational means from the budget-related pressures that I have just noted. Thus, the almost total judicial-review immunity accorded the legal decisions of the occupant of the VA General Counsel's office with respect to claims for benefits and regulations relating to benefits is, I believe, a fundamental defect in the present system.

III. ARGUMENTS AGAINST JUDICIAL REVIEW LEGISLATION

I am aware of two major arguments that have been advanced against judicial review legislation—first, that judicial review could undermine the informal nature of adjudicatory proceedings within the VA and, second, that the provisions for attorneys' fees would allow attorneys to take advantage of veterans by obtaining contingency fees, thus permitting veterans' benefits to be paid to lawyers rather than to the veterans and other claimants who are entitled to those benefits.

A. VA adjudicatory proceedings

On the first issue of undermining the adjudicatory process in place within the VA, I worked very hard in the development of S. 330, now S. 349, to structure certain VA procedures and the judicial review process in order to avoid that result. I believe that this measure would serve to enhance and improve that administrative process by clarifying certain important matters that are expressed in rather confusing regulatory language, establishing certain new procedures that preserve the nonadversary nature of BVA proceedings, and explicitly exempting VA adjudicatory procedures from the formal rules of evidence. In completing action on such legislation, the Congress would have the opportunity to structure VA administrative and court review processes in a way which it deems appropriate. I consider this to be an important opportunity at the present time because the possibility exists that—in the absence of major statutory guidelines established by Congress—cases raising procedural due process issues under the Constitution may result in the courts filling the void by establishing some procedural safeguards as constitutionally mandatory. In fact, many commentators have suggested that, if a particularly compelling case were to present a constitutional challenge to the current preclusion of judicial review and allege a denial of due process, the Supreme Court, following decisions handed down over the past decade relating to the rights of beneficiaries of governmental programs, would decide that the preclusion is unconstitutional. In that event, it seems likely that the Supreme Court or other courts would proceed to determine what the due process clause requires in terms of the agency's internal adjudicatory functions and ultimate court review of them.

Rather than run these risks of having court-made law resolving such major issues, I believe that it is far preferable for the Congress to codify certain procedures. In this regard, I believe that the provisions of title I of S. 349, which were worked out during extensive deliberations with the VA and based on the recommendations of many knowledgeable witnesses—including those representing the veterans' service organizations, all of whom supported the enactment of this title—reflect a reasonable approach that the courts would respect and that would preserve the desirable features of the VA's adjudicatory processes.

In addition, by establishing statutory rules and procedures for review of VA claims, the Congress has the opportunity to preserve the prime role of the Board of Veterans' Appeals as the expert fact finder in VA claims cases. I believe this issue is appropriately addressed in title III of S. 349. Under the provisions of that title, the scope of court review on a question of fact would be limited to a review of the record of the case as developed by the Board of Veterans' Appeals to determine if the BVA's decision was "arbitrary, capricious, or an abuse of discretion". Even if a court were to determine that the BVA's decision were so poorly founded, the court would not initially have the power to make its own factual determination. Rather, the court would be required to remand the case to the BVA for reconsideration of the factual issues involved—including further development of the evidentiary record. Those procedures would insure that the fact-finding responsibilities of the Board and the informal nature of BVA adjudications are well protected.

B. Attorneys' fees issue

On the second issue, that of attorneys taking advantage of veterans and their survivors and dependents, S. 349 would retain the existing \$10 limit on attorneys' fees at the initial claims' processing point. I believe that this limit on attorneys' fees is appropriate with respect to the initial claims stage because the initial procedures for applying for VA benefits are relatively uncomplicated, with the VA generally securing the relevant military records and evaluating the merits of the claim. In light of the availability of the highly trained service officers of the national veterans' organizations and other forms of free assistance, there would seem to be no need for the assistance of a private attorney to initiate the claims process by completing and filing an application. Continuing to discourage attorney representation at the initial application and decision stage would thus appropriately serve to protect claimants' benefits without prejudicing the claimant's ability to obtain a legal representative of his or her own choosing for purposes of reconsideration of, or appeal from, an initial denial of a claim.

Taking into account the various checks incorporated in title IV of S. 349 on unreasonable fees, I strongly believe that this approach is clearly preferable to the antiquated prohibition in section 3404 of title 38 against the payment of attorneys' fees of more than \$10.

IV. ALTERNATIVE TO JUDICIAL REVIEW

One final issue I would like to address is the alternative to judicial review which has been suggested by some, that is establishing the Board of Veterans' Appeals as an independent agency, although not a court. This suggestion has been made to counter the argument that the need for judicial review is premised on the belief that the BVA, as a VA component subordinate to the Administrator, is too intimately connected with the VA to render impartial decisions. Although I believe that there is some merit in this proposal, I believe that the approach to judicial review embodied in S. 349 is far preferable for three reasons. First, I believe veterans should be treated equally with others who are entitled to benefits through programs established by the Federal Government, virtually all of whom have recourse to the Federal courts. Second, I believe that the opportunity for an informal, administrative appeal within the VA, which the BVA provides, is much too valuable to discard in the process of providing for fully independent review. Third, in order for that proposal to be truly equitable to veterans, branches of the BVA would have to be established throughout the country since Federal district courts are readily available in all parts of the country.

V. CONCLUSION

S. 349 is a good bill that reflects a significant effort to develop legislation to address the many issues involved while taking into account the concerns raised by persons and organizations knowledgeable on VA matters.

**OPENING STATEMENT OF HON. ALAN K. SIMPSON, CHAIRMAN
OF THE SENATE COMMITTEE ON VETERANS' AFFAIRS**

Chairman SIMPSON. Let me welcome you all this morning and express my appreciation for your presence. We have two items on the agenda today: First, oversight of issues relating to the Board of Veterans' Appeals, including the question of the status of the chief members of the Board under the Civil Service Reform Act; and, second, S. 349, the proposed "Veterans' Administration Adjudication Procedure and Judicial Review Act," legislation that would provide for, among other things, judicial review of Veterans' Administration decisions.

I think these issues are related, in that they both concern the VA's adjudication of claims. However, they have separate standing on their own merits as matters certainly suitable for committee consideration and possible action.

In this regard, I don't believe that the issue of judicial review depends on the committee's evaluation of current Board of Veterans' Appeals performance.

Similarly, the fulfillment of the committee's oversight responsibility of the BVA would not be met merely by action on the judicial review legislation. So I hope we will have the witnesses addressing both current BVA matters, as well as issues addressed by S. 349.

And with reference to the BVA, in addition to the question of status of the chief members of the Board, the committee is interested in hearing testimony of the Board's current workload; the timeliness of its decisions, and recommendations for action that might help to insure that the Board carries out its duties.

On the issue of judicial review, I supported of that legislation in the last session. I remain very receptive and open about that bill. I know that Al Cranston, my good friend and predecessor as chairman, has invested a great deal of his time in that issue, as has my fine friend from Colorado, Gary Hart.

They are strong advocates of this legislation. I appreciate their expressions of support. I guess I feel a renewed responsibility as chairman, particularly with a new crew finally now moving into place at the VA, to consider this bill carefully from this new perspective.

And I am interested in the hearing of today's testimony by the VA as part of that process. Various issues are addressed there under the four titles, and even if there may be some questions about certain portions of the bill, some of the other sections could go forward separately. We will look into that.

And I ask the witnesses to reflect on that possibility.

The bill, S. 349, agency reports, and related statements thereon will be inserted in the record at this point.

[The bill, S. 349, agency reports, and related statements thereon follow:]

97TH CONGRESS
1ST SESSION

S. 349

To amend title 38, United States Code, to establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans' Administration; to apply the provisions of section 553 of title 5, United States Code, to rulemaking procedures of the Veterans' Administration; to provide for judicial review of certain final decisions of the Administrator of Veterans' Affairs; to provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws administered by the Veterans' Administration; and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 30 (legislative day, JANUARY 5), 1981

Mr. HART (for himself, Mr. CRANSTON, and Mr. DECONCINI) introduced the following bill; which was read twice and referred to the Committee on Veterans' Affairs

A BILL

To amend title 38, United States Code, to establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans' Administration; to apply the provisions of section 553 of title 5, United States Code, to rulemaking procedures of the Veterans' Administration; to provide for judicial review of certain final decisions of the Administrator of Veterans' Affairs; to provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws

administered by the Veterans' Administration; and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That (a) this Act may be cited as the "Veterans' Administra-
4 tion Adjudication Procedure and Judicial Review Act".

5 (b) Except as otherwise expressly provided, whenever in
6 this Act an amendment or repeal is expressed in terms of an
7 amendment to, or repeal of, a section or other provision, the
8 reference shall be considered to be made to a section or other
9 provision of title 38, United States Code.

10 TITLE I—ADJUDICATION PROCEDURES

11 SEC. 101. (a) Chapter 51 is amended by adding at the
12 end of subchapter I thereof the following new section:

13 "§ 3007. Burden of proof; benefit of the doubt

14 "(a) Except when otherwise provided by the Adminis-
15 trator in accordance with the provisions of this title, a claim-
16 ant for benefits under laws administered by the Veterans'
17 Administration shall have the burden of submitting evidence
18 sufficient to justify a belief by a fair and impartial individual
19 that the claim is well grounded.

20 "(b) When, after consideration of all evidence and mate-
21 rial of record in any proceeding before the Veterans' Admin-
22 istration on a claim for any benefit under laws administered
23 by the Veterans' Administration, there is an approximate
24 balance of positive and negative evidence regarding the

1 merits of an issue material to the determination of such
2 claim, the benefit of the doubt in resolving each such issue
3 will be given to the claimant, but nothing in this section shall
4 be construed as shifting from a claimant to the Administrator
5 the burden described in subsection (a) of this section.”.

6 (b)(1) The table of chapters at the beginning of title 38,
7 United States Code, and the table of chapters at the begin-
8 ning of part IV of such title are each amended by striking out
9 in the item relating to chapter 51 “Applications” and insert-
10 ing in lieu thereof “Claims,”.

11 (2) The heading of such chapter is amended to read as
12 follows:

13 **“CHAPTER 51—CLAIMS, EFFECTIVE DATES, AND**
14 **PAYMENTS”.**

15 (c)(1) The table of sections at the beginning of such
16 chapter is amended by striking out in the item relating to
17 subchapter I “APPLICATIONS” and inserting in lieu thereof
18 “CLAIMS”.

19 (2) The heading of subchapter I of such chapter is
20 amended to read as follows:

21 **“Subchapter I—Claims”.**

22 (d) The table of sections at the beginning of such chap-
23 ter is amended by adding after the item relating to section
24 3006 a new item as follows:

“3007. Burden of proof; benefit of the doubt.”.

1 SEC. 102. Section 3311 is amended by adding at the
2 end thereof the following new sentence: "Subpenas author-
3 ized under this section shall be served by any individual au-
4 thorized by the Administrator by (1) delivering a copy thereof
5 to the individual named therein, or (2) mailing by registered
6 or certified mail addressed to such individual at such individ-
7 ual's last dwelling place or principal place of business. A
8 verified return by the individual so serving the subpoena set-
9 ting forth the manner of service, or, in the case of service by
10 registered or certified mail, the return post office receipt
11 therefor signed by the individual so served shall be proof of
12 service."

13 SEC. 103. Section 4001 is amended by—

14 (1) amending subsection (a) by striking out "(not
15 more than fifty)" and inserting in lieu thereof "(not
16 more than sixty-five)", striking out "associate", and
17 inserting before the period at the end of the second
18 sentence "in a timely manner"; and

19 (2) adding at the end thereof the following new
20 subsection:

21 "(c) The Chairman shall submit a report to the appro-
22 priate committees of the Congress, not later than February 1,
23 1980, and annually thereafter, on the experience of the
24 Board during the prior fiscal year together with projections
25 for the fiscal year in which the report is submitted and the

1 subsequent fiscal year. Such report shall contain, as a mini-
2 mum, the number of cases appealed to the Board during
3 the prior fiscal year, the number of cases pending before the
4 Board at the beginning and end of such fiscal year, the
5 number of such cases which were filed during each of the
6 twenty-four months preceding the prior fiscal year and the
7 then current fiscal year, respectively, the average length of
8 time a case was before the Board between the time of filing
9 of an appeal and the disposition during the prior fiscal year,
10 and the number of members and other professional, adminis-
11 trative, clerical, stenographic, and other personnel employed
12 by the Board at the end of the prior fiscal year. The projec-
13 tions for the current fiscal year and subsequent fiscal year
14 shall include, for each such year, estimates of the number of
15 cases to be appealed to the Board and an evaluation of the
16 Board's ability, based on existing and projected personnel
17 levels, to ensure timely disposition of such appeals as re-
18 quired by subsection (a) of this section."

19 SEC. 104. Section 4002 is amended by striking out "as-
20 sociate" wherever it appears.

21 SEC. 105. Subsections (a) and (b) of section 4003 are
22 amended by inserting a comma and "after notice to the
23 claimant of such additional information together with an op-
24 portunity to be heard in connection with such information,"
25 after "concerned" both places it appears.

1 SEC. 106. Section 4004 is amended by—

2 (1) inserting before the period at the end of the
3 second sentence in subsection (a) “after affording the
4 claimant an opportunity for a hearing and shall be
5 based exclusively on evidence and material of record in
6 the proceeding and on applicable provisions of law”;

7 (2) amending subsection (b) by striking out “in the
8 form of official reports from the proper service depart-
9 ment” and adding at the end thereof, the following
10 new sentence: “A judicial decision upholding, in whole
11 or in part, the disallowance of a claim under chapter
12 72 of this title shall not diminish the Board’s discre-
13 tionary authority under this subsection to reopen the
14 claim and review the Board’s former decision.”; and

15 (3) amending subsection (d) to read as follows:

16 “(d) After reaching a decision in each case, the Board
17 shall promptly mail notice of its decision to the claimant and
18 the claimant’s authorized representative, if any, at the last
19 known address of the claimant and at the last known address
20 of the claimant’s authorized representative, if any. Each deci-
21 sion of the Board shall include—

22 “(1) a written statement of the Board’s findings
23 and conclusions, and reasons or bases therefor, on all
24 material issues of fact, law, and matters of discretion
25 presented on the record; and

1 “(2) an order granting appropriate relief or deny-
2 ing relief.”.

3 SEC. 107. Paragraph (5) of subsection (d) of section
4 4005 is amended by striking out “will base its decision on the
5 entire record and”.

6 SEC. 108. Section 4009 is amended by adding after sub-
7 section (b) the following new subsection:

8 “(c) Whenever there exists in the evidence of record in
9 an appeal case a substantial disagreement between the sub-
10 stantiated findings or opinions of two physicians with respect
11 to an issue material to the outcome of the case, the Board
12 shall, upon the request of the claimant and, after taking ap-
13 propriate action to attempt to resolve the disagreement, ar-
14 range for an advisory medical opinion in accordance with the
15 procedure prescribed in subsection (b) of this section. If the
16 Board denies the request of such claimant for such an opin-
17 ion, the Board shall prepare and provide to the claimant and
18 the claimant’s authorized representative, if any, a statement
19 setting forth the basis for its determination. Actions of the
20 Board under this subsection, including any such denial, shall
21 be final and conclusive and no other official or any court of
22 the United States shall have the power or jurisdiction to
23 review any aspect of any such decision by an action in the
24 nature of mandamus or otherwise, chapter 72 of this title to
25 the contrary notwithstanding.”.

1 SEC. 109. (a) Chapter 71 is further amended by adding
2 at the end thereof the following new sections:

3 **"§ 4010. Adjudication procedures**

4 "(a) For purposes of conducting any hearing, investiga-
5 tion, or other proceeding in connection with the consideration
6 of a claim for benefits under laws administered by the Veter-
7 ans' Administration, the Administrator may administer oaths
8 and affirmations, examine witnesses, and receive evidence.

9 "(b) Any oral, documentary, or other evidence, even
10 though inadmissible under the rules of evidence applicable to
11 judicial proceedings, may be admitted in a hearing, investiga-
12 tion, or other proceeding in connection with the consideration
13 of a claim for benefits under laws administered by the Veter-
14 ans' Administration, but the Administrator, under regulations
15 of the Administrator, may provide for the exclusion of irrele-
16 vant, immaterial, or unduly repetitious evidence.

17 "(c) In the course of any proceeding before the Board,
18 any party to such proceeding or such party's authorized rep-
19 resentative shall be afforded opportunity—

20 "(1) at a reasonable time prior thereto as well as
21 during such proceeding, to examine and, on payment of
22 a fee prescribed pursuant to section 3302(b) of this title
23 (not to exceed the direct cost of duplication), obtain
24 copies of the contents of the case files and all docu-

1 ments and records to be used by the Veterans' Admin-
2 istration at such proceeding;

3 “(2) to present witnesses and evidence, subject
4 only to such restrictions as may be set forth in regula-
5 tions of the Administrator, pursuant to subsection (b) of
6 this section, as to materiality, relevance, and undue
7 repetition;

8 “(3) to make oral argument and submit written
9 contentions, in the form of a brief or similar document,
10 on substantive and procedural issues;

11 “(4) to submit rebuttal evidence;

12 “(5) to present medical opinions and request an
13 independent advisory medical opinion pursuant to sec-
14 tion 4009(c) of this title; and

15 “(6) to serve written interrogatories on any
16 person, including employees of the Veterans' Adminis-
17 tration, which interrogatories shall be answered sepa-
18 rately and fully in writing and under oath unless writ-
19 ten objection thereto, in whole or in part, is filed with
20 the Administrator by the person to whom the interro-
21 gatories are directed or such person's representative.

22 The fee provided for in clause (1) of this subsection may be
23 waived by the Administrator, pursuant to regulations which
24 the Administrator shall prescribe, on account of the party's
25 inability to pay or for other good cause shown. In the event

1 of any objection, filed under clause (6) of this subsection, the
2 Administrator shall, pursuant to regulations which the Ad-
3 ministrator shall prescribe establishing standards consistent
4 with standards for protective orders under rule 26(c) of the
5 Rules of Civil Procedure for the United States District
6 Courts, evaluate such objection and issue an order (A) direct-
7 ing that, within such period as the Administrator shall speci-
8 fy, the interrogatory or interrogatories objected to be an-
9 swered as served or answered after modification, or (B) indi-
10 cating that the interrogatory or interrogatories are no longer
11 required to be answered. If any person upon whom interroga-
12 tories are served under this section fails to answer or fails to
13 provide responsive answers to any such interrogatories
14 within thirty days after service or such additional time as the
15 Administrator may allow, the Administrator shall, upon a
16 statement or showing by the party who served such interroga-
17 tories of general relevance and reasonable scope of the evi-
18 dence sought, issue a subpoena pursuant to section 3311 of
19 this title (with enforcement of such subpoena to be available
20 pursuant to section 3313 of this title) for such person's ap-
21 pearance and testimony on such interrogatories at a deposi-
22 tion on written questions, at a location within one hundred
23 miles of where such person resides, is employed, or transacts
24 business.

1 “(d) In the course of any hearing, investigation, or other
2 proceeding in connection with the consideration of a claim for
3 benefits under laws administered by the Veterans’ Adminis-
4 tration, an employee of the Veterans’ Administration may at
5 any time disqualify himself or herself, on the basis of personal
6 bias or other cause, from adjudicating the claim. On the filing
7 by a party in good faith of a timely and sufficient affidavit
8 averring personal bias or other cause for disqualification on
9 the part of such an employee, the Administrator shall deter-
10 mine the matter as a part of the record and decision in the
11 case.

12 “(e) The transcript or recording of testimony and the
13 exhibits, together with all papers and requests filed in the
14 proceeding, and the decision of the Board shall constitute the
15 exclusive record for decision in accordance with section
16 4004(a) of this title, and shall be available for inspection by
17 any party to such proceeding, or such party’s authorized rep-
18 resentative, at reasonable times and places and, on the pay-
19 ment of a fee prescribed pursuant to section 3302(b) of this
20 title (not to exceed the direct cost of duplication), shall be
21 copied for the claimant or such claimant’s authorized repre-
22 sentative within a reasonable time. Such fee may be waived
23 by the Administrator, pursuant to regulations which the Ad-
24 ministrator shall prescribe, on account of the party’s inability
25 to pay or for other good cause shown.

1 “(f) Notwithstanding section 4004(a) of this title, section
2 554(a) of title 5, or any other provision of law, adjudication
3 and hearing procedures prescribed in this title and in regula-
4 tions prescribed by the Administrator under this title for the
5 purpose of administering veterans’ benefits shall be exclusive
6 with respect to hearings, investigations, and other proceed-
7 ings in connection with the consideration of a claim for bene-
8 fits under laws administered by the Veterans’ Administration.

9 **“§ 4011. Notice of procedural rights**

10 “In the case of any denial, in whole or in part, of a
11 claim for benefits under laws administered by the Veterans’
12 Administration, the Administrator shall, at each procedural
13 stage relating to the disposition of such a claim, beginning
14 with denial after an initial review or determination and in-
15 cluding the furnishing of a statement of the case and the
16 making of a final determination by the Board, provide to the
17 claimant and such claimant’s authorized representative, if
18 any, written notice of the procedural rights of the claimant.
19 Such notices shall be on such forms as the Administrator
20 shall prescribe by regulation and shall include, in easily un-
21 derstandable language, with respect to proceedings before the
22 Veterans’ Administration, (1) descriptions of all subsequent
23 procedural stages provided for by statute, regulation, or Vet-
24 erans’ Administration policy, (2) descriptions of all rights of
25 the claimant expressly provided for in or pursuant to this

1 chapter, of the claimant's rights to a hearing, to reconsider-
 2 ation, to appeal, and to representation, and of any specific
 3 procedures necessary to obtain the various forms of review
 4 available for consideration of the claim, and (3) such other
 5 information as the Administrator, as a matter of discretion,
 6 determines would be useful and practical to assist the claim-
 7 ant in obtaining full consideration of the claim."

8 (b) The table of sections at the beginning of such chap-
 9 ter is amended by adding at the end thereof the following
 10 new items:

"4010. Adjudication procedures.

"4011. Notice of procedural rights."

11 SEC. 110. (a) In order to evaluate the feasibility and
 12 desirability of alternative methods of (1) assuring the resolu-
 13 tion of claims before the Administrator of Veterans' Affairs
 14 for benefits under laws administered by the Veterans' Admin-
 15 istration as promptly and efficiently as feasible following the
 16 filing of a notice of disagreement pursuant to section 4005 (as
 17 amended by section 107 of this Act) or 4005A of title 38,
 18 United States Code, and (2) affording claimants the opportu-
 19 nity for a hearing before or review by a disinterested authori-
 20 ty at a location as convenient and on as timely basis as possi-
 21 ble for each claimant, the Administrator shall conduct a study
 22 for a period of between twenty-four and thirty-six months, in
 23 at least six geographic areas and at at least six regional of-

1 fices of the Veterans' Administration, involving two alterna-
2 tive methods for resolution of claims.

3 (b)(1) In at least three such geographic areas, the Ad-
4 ministrator shall provide an intermediate-level adjudication
5 process whereby each claimant may, within the time afforded
6 such claimant under paragraph (3) of such section 4005(d) or
7 4005A(b) to file an appeal, request a de novo hearing at the
8 agency of original jurisdiction (as described in section
9 4005(b)(1) of such title 38) before a panel of three Veterans'
10 Administration employees, each of whose primary responsi-
11 bilities include adjudicative functions but none of whom shall
12 have previously considered the merits of the claim at issue.
13 Following such hearing, such panel shall render a decision
14 and prepare a new statement of the case in accordance with
15 the requirements of paragraphs (1) and (2) of such section
16 4005(d). Such new statement of the case shall, for all pur-
17 poses relating to appeals under chapter 71 of such title 38, be
18 considered to be a statement of the case as required by para-
19 graph (1) of such section 4005(d).

20 (2) In at least three other such geographic areas, the
21 Administrator shall provide for an enhanced schedule of
22 visits, on at least a quarterly basis each year, by a panel or
23 panels of the Board of Veterans' Appeals to conduct formal
24 recorded hearings pursuant to such section 4002 in such
25 areas.

1 (c) Not later than forty-two months after the date of
2 enactment of this Act, the Administrator shall report to the
3 Congress on the results of this study, including an evaluation
4 of the cost factors associated with each alternative on an
5 annual basis, the impact on the workload of the regional
6 office in question, the impact on the annual caseload of the
7 Board of Veterans' Appeals resulting from both alternatives,
8 together with any recommendations for administrative or leg-
9 islative action, or both, as may be indicated by the results of
10 such study.

11 **TITLE II—VETERANS' ADMINISTRATION RULE**
12 **MAKING**

13 **SEC. 201.** (a) Subchapter II of chapter 3 is amended by
14 adding at the end thereof the following new section:

15 **"§ 221. Rule making**

16 "Notwithstanding the provisions of subsection (a)(2) of
17 section 553 of title 5, the promulgation of rules and regula-
18 tions by the Administrator shall be subject to the require-
19 ments of section 553 of title 5."

20 (b) The table of sections at the beginning of such chap-
21 ter is amended by adding at the end thereof the following:

"221. Rule making."

1 **TITLE III—JUDICIAL REVIEW**

2 SEC. 301. Subsection (a) of section 211 is amended by
3 striking out “sections 775, 784” and inserting in lieu thereof
4 “sections 775 and 784 and chapter 72 of this title”.

5 SEC. 302. (a) Part V is amended by adding after chap-
6 ter 71 the following new chapter:

7 **“CHAPTER 72—JUDICIAL REVIEW**

“Sec.

“4025. Jurisdiction.

“4026. Scope of review.

“4027. Remands.

“4028. Survival of actions.

“4029. Appellate review.

8 **“§ 4025. Jurisdiction**

9 “(a) Except as provided in subsection (h) of this section,
10 after any final decision of the Administrator (as defined in
11 subsection (c) of this section) adverse to a claimant in a
12 matter involving a claim for benefits under any law adminis-
13 tered by the Veterans’ Administration, such claimant may
14 obtain a review of such decision in a civil action commenced
15 within 180 days after the mailing to the claimant of notice of
16 such decision pursuant to section 4004 of this title. Such
17 action shall be brought against the Administrator in the dis-
18 trict court of the United States for the judicial district in
19 which the plaintiff resides or the plaintiff’s principal place of
20 business is located, or in the district court of the United
21 States for the judicial district where the principal offices of

1 the Board of Veterans' Appeals (established under section
2 4001 of this title) are located.

3 “(b) In any matter not directly involving a claim for
4 benefits under any law administered by the Veterans' Admin-
5 istration, section 211(a) of this title shall not operate as a bar
6 to a civil action otherwise authorized by law.

7 “(c) For the purposes of this chapter, ‘final decision of
8 the Administrator’ means—

9 “(1) a final determination of the Board of Veter-
10 ans' Appeals pursuant to section 4004 (a) or (b) of this
11 title; or

12 “(2) a dismissal of an appeal by the Board of Vet-
13 erans' Appeals pursuant to section 4005 or 4008 of
14 this title.

15 “(d) The provisions of this chapter shall not apply to
16 matters arising under chapters 19 and 37 of this title.

17 “(e) The complaint initiating an action under subsection
18 (a) of this section shall contain sufficient information to
19 permit the Administrator to identify and locate the plaintiff's
20 Veterans' Administration records.

21 “(f) The Administrator shall file, together with the
22 answer to a complaint filed pursuant to subsection (a) of this
23 section, a certified copy of the records upon which the find-
24 ings of fact and decision complained of are based or, if the
25 Administrator determines that the cost of filing copies of all

1 such records is unduly expensive, the Administrator shall file
2 a complete index of all documents, transcripts, or other mate-
3 rials comprising such records. After such index is filed and
4 after considering requests from all parties, the court shall re-
5 quire the Administrator to file certified copies of such indexed
6 items as the court deems relevant to its consideration of the
7 case.

8 “(g) In an action brought pursuant to subsection (a) of
9 this section, the court shall have the power, upon the plead-
10 ings and the records specified in subsection (f) of this section,
11 to enter judgment in accordance with section 4026 of this
12 title or remand the cause in accordance with section 4026 or
13 4027 of this title.

14 “(h) No action may be brought under this section as to
15 which the initial claim for benefits is filed pursuant to section
16 3001(a) of this title after the last day of the fifth fiscal year
17 beginning after the effective date of this section.

18 **“§ 4026. Scope of review**

19 “(a) In any action brought under section 4025 of this
20 title, the reviewing court to the extent necessary to its deci-
21 sion and when presented, shall—

22 “(1) decide all relevant questions of law, interpret
23 constitutional, statutory, and regulatory provisions;

24 “(2) compel action of the Administrator unlaw-
25 fully withheld; and

1 “(3) hold unlawful and set aside decisions, find-
2 ings, and conclusions of the Administrator found to
3 be—

4 “(A) arbitrary, capricious, an abuse of discre-
5 tion, or otherwise not in accordance with law;

6 “(B) contrary to constitutional right, power,
7 privilege, or immunity;

8 “(C) in excess of statutory jurisdiction, au-
9 thority, or limitations, or in violation of a statu-
10 tory right; or

11 “(D) without observance of procedure re-
12 quired by law.

13 If the reviewing court finds the Administrator's finding on an
14 issue or issues of fact to be arbitrary, capricious, or an abuse
15 of discretion, the court shall specify where it finds the record
16 to be deficient and shall, prior to entering any judgment re-
17 versing such decision, remand the case a single time to the
18 Administrator for further action not inconsistent with the
19 court's order. In so remanding, the court shall specify a rea-
20 sonable period within which the Administrator shall complete
21 the required action and, if such action is not completed within
22 the time specified by the court, the matter shall be returned
23 to the court for its action.

24 “(b) In making the determinations under subsection (a)
25 of this section, the court shall review the whole record before

1 the court pursuant to section 4025(f) of this title or those
2 parts of such record cited by a party, and due account shall
3 be taken of the rule of prejudicial error.

4 “(c) In no event shall findings of fact made by the Ad-
5 ministrator be subject to trial de novo by the reviewing court.

6 “(d) When a final decision of the Administrator (as de-
7 fined in section 4025(c) of this title) is rendered in any case
8 and such decision is adverse to a party solely because of the
9 failure of such party to comply with any applicable regulation
10 of the Veterans’ Administration, the court shall review only
11 questions raised as to compliance with and the validity of the
12 regulation.

13 **“§ 4027. Remands**

14 “In any action brought under section 4025 of this title,
15 the reviewing court shall, on motion of the Administrator
16 made before the expiration of the time specified for the filing
17 of an answer to a complaint filed pursuant to subsection (a) of
18 such section, allow a single remand of a case to the Adminis-
19 trator for further review by the Administrator. If such review
20 is not completed within ninety days after the date of such
21 remand, the matter shall be returned to the court for its
22 action. At any time after the Administrator files an answer,
23 the court may, in the exercise of its discretion, remand the
24 case to the Administrator for further action by the Adminis-
25 trator and, if either party shall apply to the court for leave to

1 adduce additional evidence and shall show to the satisfaction
2 of the court that such additional evidence is material and that
3 there is good cause for granting such leave, the court shall
4 remand the case to the Administrator and order such addi-
5 tional evidence to be taken by the Administrator; in either
6 case, the court may specify a reasonable period of time
7 within which the Administrator shall complete the required
8 action. After a case is remanded to the Administrator, and
9 after further action by the Administrator, including consider-
10 ation of any additional evidence, the Administrator shall
11 modify, supplement, or affirm the findings of fact or decision,
12 or both, and shall file with the court any such modification,
13 supplementation, or affirmation of findings of fact or decision
14 or both, as the case may be, and certified copies of any addi-
15 tional records and evidence upon which such modification,
16 supplementation, or affirmation was based. Any such modifi-
17 cation, supplementation, or affirmation of the findings of fact
18 or decision shall be reviewable by the court only to the extent
19 provided in section 4026 of this title with respect to the
20 review of the original findings of fact and decision.

21 **"§ 4028. Survival of actions**

22 "Any action brought under section 4025 of this title
23 shall survive, notwithstanding any change in the person oc-
24 cupying the Office of the Administrator or any vacancy in
25 such office.

1 **"§ 4029. Appellate review**

2 "The decisions of a district court pursuant to this chap-
3 ter shall be subject to appellate review by the courts of ap-
4 peals and the Supreme Court of the United States in the
5 same manner as judgments in other civil actions."

6 (b) The table of chapters at the beginning of title 38,
7 United States Code, and the table of chapters at the begin-
8 ning of part V are each amended by adding below the item
9 relating to chapter 71 a new item as follows:

 "72. Judicial Review..... 4025".

10 SEC. 303. Subsection (d) of section 1346 of title 28,
11 United States Code, is amended by inserting before the
12 period at the end thereof "except as provided for in chapter
13 72 of title 38".

14 **TITLE IV—ATTORNEYS' FEES**

15 SEC. 401. Section 3404 is amended by—

16 (1) amending subsection (c) to read as follows:

17 "(c) The Administrator, pursuant to regulations which
18 the Administrator shall prescribe, may determine and ap-
19 prove payment of reasonable attorneys' fees to be paid by the
20 claimant, to attorneys recognized under this section, for serv-
21 ices rendered in representing an individual before the Veter-
22 ans' Administration in connection with claims for benefits
23 under laws administered by the Veterans' Administration. In
24 no event shall such attorneys' fee, determined and approved
25 by the Administrator, exceed—

1 “(1) for any claim resolved prior to the claimant’s
2 receipt of a statement of the case pursuant to section
3 4005(d) of this title, \$10; or

4 “(2) for any claim resolved following the claim-
5 ant’s receipt of such statement of the case, an amount
6 in excess of the lesser of—

7 “(A) the fee agreed upon by the claimant
8 and the attorney; or

9 “(B)(i) \$500, or a greater amount specified in
10 regulations prescribed by the Administrator based
11 on changed national economic conditions subse-
12 quent to the date of enactment of this subsection,
13 except that the Administrator may, in the Admin-
14 istrator’s discretion, determine and approve a fee
15 in excess of \$500, or such greater amount if so
16 specified, in an individual case involving extraor-
17 dinary circumstances warranting a higher fee; or

18 “(ii) if the claimant and an attorney have en-
19 tered into an agreement under which no fee is
20 payable to such attorney unless the claim is re-
21 solved in a manner favorable to the claimant, 25
22 per centum of the total amount of any past-due
23 benefits awarded on the basis of the claim.”; and

24 (2) adding at the end of such section the following
25 new subsections:

1 “(d) If, in an action brought under section 4025 of this
2 title, the matter is resolved in a manner favorable to a claim-
3 ant who was represented by an attorney, the court may de-
4 termine and approve as part of its judgment a reasonable fee
5 for the representation of such claimant in such action. When
6 the claimant and an attorney have entered into an agreement
7 under which no fee is payable to such attorney unless the
8 matter is resolved in a manner favorable to the claimant, the
9 fee so determined and approved shall not exceed 25 per
10 centum of the total amount of any past-due benefits awarded
11 on the basis of the claim. If, in such an action, the matter is
12 not resolved in a manner favorable to a claimant, the court
13 may determine and approve as part of its judgment a reason-
14 able fee, taking into consideration the extent to which there
15 could have appeared to have been a reasonable probability of
16 success for such an action at the time it was filed, for the
17 representation of such claimant not in excess of \$750.

18 “(e) To the extent that past-due benefits are awarded in
19 proceedings before the Administrator or by a court, the Ad-
20 ministrator shall direct payment of any attorney’s fee that
21 has been determined and approved under this section out of
22 such past-due benefits, but in no event shall the Administra-
23 tor withhold any portion of benefits payable for a period sub-
24 sequent to the date of the decision of the Administrator or
25 court making such award.

1 “(f) The determination and approval by the Administra-
2 tor regarding attorneys’ fees pursuant to subsection (c) of this
3 section may be reviewed by a court only to determine
4 whether the Administrator’s action constituted an abuse of
5 discretion. Review of the determination and approval by
6 either the Administrator or the court regarding an attorneys’
7 fee shall be obtained as follows:

8 “(1) For an award in conjunction with a claim
9 before the Administrator pursuant to subsection (c) of
10 this section, by an action brought, within thirty days
11 after the date of notice of such award, by either the
12 claimant or the attorney in the district court of the
13 United States in the judicial district in which the
14 claimant resides or the claimant’s principal place of
15 business is located.

16 “(2) For an award in conjunction with a claim ap-
17 proved by a United States court pursuant to subsection
18 (d) of this section, on a motion made, within thirty
19 days after the date of such award, by either the claim-
20 ant or the attorney in the district court of the United
21 States where the appeal was considered.

22 For actions brought under clause (1) of this subsection, the
23 Administrator shall be named as the defendant, but notice of
24 any such action shall also be given to all parties in interest

1 and all such parties shall be heard by the court reviewing the
2 award.

3 “(g) The provisions of this section shall apply only to
4 cases involving claims for benefits under the laws adminis-
5 tered by the Veterans’ Administration, and such provisions
6 shall not apply in cases in which the Veterans’ Administra-
7 tion is the plaintiff or in which other attorneys’ fee statutes
8 are otherwise controlling.

9 “(h) For the purposes of subsections (c) and (d) of this
10 section, claims shall be considered as resolved in a manner
11 favorable to the claimant when all or any part of the relief
12 sought is granted.

13 “(i) In an action brought under section 4025 of this title,
14 the court, in its discretion, may, as an extraordinary remedy,
15 allow the prevailing party, other than the Administrator, rea-
16 sonable attorneys’ fees as part of the costs.”.

17 SEC. 402. Section 3405 is amended by striking out “or”
18 after “title,” and striking out “him” and inserting in lieu
19 thereof “such claimant or beneficiary, or (3) with intent to
20 defraud, in any manner willfully and knowingly deceives,
21 misleads, or threatens a claimant or beneficiary or prospec-
22 tive claimant or beneficiary under this title with reference to
23 any matter covered by this title, by word, circular, letter, or
24 advertisement”.

1 TITLE V—EFFECTIVE DATES

2 SEC. 501. The provisions of this Act shall become effec-
3 tive on the first day of the first month beginning 180 days
4 after the date of enactment of this Act.

5 SEC. 502. A civil action authorized in chapter 72 of title
6 38, United States Code, as added by section 302 of this Act,
7 may be instituted to review decisions of the Board of Veter-
8 ans' Appeals rendered on or after January 1, 1977, and prior
9 to the effective date of this Act, but only if such actions are
10 instituted not later than 180 days after the effective date of
11 this Act or after the mailing of notice by the Administrator to
12 the last known address of a claimant of the right to bring
13 such a civil action, whichever occurs later.

VETERANS' ADMINISTRATION ADJUDICATION PROCEDURE AND JUDICIAL REVIEW ACT

Mr. HART. Mr. President, today Senator Cranston, Senator DeConcini and I are introducing legislation to provide for limited judicial review of the administrative actions of the Veterans' Administration—the second largest client agency of the Federal Government. The bill will also provide for the payment of reasonable attorney's for veterans who wish to be represented by legal counsel in hearings before the Veterans' Administration or the Federal courts. Additionally, this measure will require the VA to comply with the rulemaking provisions of the Administrative Procedure Act (APA) and to take other actions to safeguard the procedural due process rights of the veteran.

Mr. President, I first introduced legislation to open the administrative procedures of the Veterans' Administration to the scrutiny of the Federal courts in the 94th Congress. Since that time, with the full and complete cooperation and assistance of the distinguished Senator from California (Senator Cranston), the Senate Veterans' Affairs Committee, during the 1st session of the 96th Congress, reported out and the full Senate passed S. 330, the Veterans' Administration Adjudication Procedure and Judicial Review Act. The successful consideration by the Senate of S. 330 was the result of an exhaustive series of 7 hearings held by the Senate Veterans' Affairs Committee and extensive staff work by the committee VA staff, and other interested parties. The bill we are reintroducing today is identical to the measure which was unanimously passed by the Senate on September 17, 1979.

Unfortunately, the U.S. House of Representatives did not act on S. 330 during the 96th Congress. The House Veterans' Affairs Committee did hold two hearings on the issue of judicial review of veterans' claims in November of 1980, but no bill granting judicial review of VA claims was reported by the committee.

Mr. President, the Veterans' Administration is unique among major Federal agencies in that its benefit decisions are not subject to the scrutiny of the Federal courts. In addition, there is an outdated \$10 limitation on the amount a veteran may pay an attorney to assist in the preparation and presentation of a claim for benefits before the VA which prevents many veterans from being represented by legal counsel of their choosing.

At present, 1 of 58 local VA rating boards first reviews a veteran's case to determine if he or she is eligible for disability, pension, or other benefits. If the local board renders an unfavorable decision, the veterans can appeal to the Board of Veterans Appeals (BVA) in Washington, D.C., which is also a part of the VA. Under existing law, the decision of the BVA on "any question of law or fact under law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors, shall be final and conclusive, and no other official or any court of the United States shall have power or jurisdiction to review any such decision * * *" (title 38 U.S.C., Sec. 211(a)). Unlike claimants before other Federal agencies, a veteran who feels that the BVA has misinterpreted the law or decided a case without taking all relevant facts into account has no recourse outside the Veterans' Administration.

For more than two decades, the Social Security Administration (which also adjudicates disability claims) has been subject to judicial review of its final benefit decisions (title 42, U.S.C., Sec. 405(g)).

Mr. President, to insulate any agency from the scrutiny of the federal courts runs counter to some of the most cherished constitutional principles. In human terms, this denial of the due process rights of veterans has too often resulted in hardship and disillusionment for those who have defended our country and are most deserving of the fruits of our constitutional form of government.

Although veterans may be represented by counsel in proceedings before the VA, the amount a claimant can pay an attorney is limited to \$10 (title 38, U.S.C. Sec. 3404(c)). This fee limitation, which was instituted more than a century ago, severely limits the ability of a veteran to exercise freedom of choice in obtaining effective legal counsel.

Less than 2 percent of veterans who appeal their claims to the Board of Veterans Appeals are represented by legal counsel. Currently, veterans can obtain assistance without charge in preparing and presenting claims before the Veterans' Administration from the various national veterans' service organizations and VA benefit counselors. In most cases, the assistance given by these representatives is of excellent quality, providing the VA Rating Board with sufficient evidence to render a fair and equitable decision on the veteran's claim.

Many cases, however, involve complex legal and technical issues. If a veteran desires the representation of an attorney in these proceedings, the \$10 fee restric-

tion severely limits the right to counsel because almost no attorney is available at this unrealistic rate.

Veterans who desire outside legal representation in VA proceedings should be able to exercise that right. This legislation established a schedule for the payment of attorneys which insures that the veteran will be able to secure competent counsel without fear that an inordinate portion of any payment he or she may receive be devoted to legal expenses. Therefore, the \$10 limitation for payment of attorneys who represent veterans in making original claims before local VA rating boards is retained. Most original claims are relatively simple to prepare and, or course, the veteran may seek the competent help of a veterans service organization officer or VA counselor in presenting his original claim.

Recently, the Federal courts have greatly expanded their jurisdiction over VA actions which were formerly precluded from judicial review. For example, a landmark decision by the U.S. Supreme Court was *Johnson v. Robison*, 415 U.S. 361 (1974) which held that section 211(a) (precluding judicial review) cannot be construed to deny jurisdiction to those who challenge the constitutionality of statutes providing veterans benefits.

In the case *Plato v. Roudebush*, 397 F. Supp. 1295, D-Md. (1975), the Federal District for the District of Maryland held that section 211(a) does not preclude judicial review of VA procedures in instances where VA pensions were terminated by the agency without a pretermination hearing.

In a recent court case, *Wayne State University v. Cleland*, 590 F.2d 627 (6th Cir. 1978), the Court of Appeals held that section 211(a) is not a bar to judicial review of the constitutionality of rules and regulations promulgated by the Administrator of Veterans' Affairs or his authority to promulgate regulations.

Mr. President, the fundamental issue addressed in the bill we are introducing today is simple justice for the American veteran. To deny a citizen access to an attorney, isolate an agency from the scrutiny of the courts and to fail to allow judicial review of the rules and regulations which govern the operation of a Federal agency runs counter to some of the most basic precepts of our constitutional form of government.

The bill Senator Cranston and I are introducing today reflects several years of hard work by many individuals, and will insure that veterans of this Nation are granted the full measure of their constitutional rights.

Mr. CRANSTON. Mr. President, I today join with the Senator from Colorado (Mr. HART) in introducing S. 349, the proposed "Veterans' Administration Adjudication Procedure and Judicial Review Act." I am delighted to note that we are joined today by a new member of the Veterans' Affairs Committee, the Senator from Arizona (Mr. DeCONCINI), who served in the last Congress as the chairman of the Subcommittee on Improvements in Judicial Machinery of the Judiciary Committee and, in this Congress, is the ranking minority member of the Subcommittee on the Constitution on that committee and who therefore has very extensive background in the theoretical and practical underpinnings of this legislation.

Mr. President, the Senator from Colorado (Mr. HART) has been the principal supporter in recent years of legislation to provide judicial review of decisions of the Veterans' Administration on claims for benefits before that agency, and it was his persistent effort, beginning in the 94th Congress, that played such a large role in Senate passage in the last Congress of S. 330, legislation identical to that which is being introduced today. I know Senator Hart stands ready to help gain Senate support for and action on this measure in this Congress, and I am glad to be working with him again so closely on this issue.

Mr. President, we introduced, as S. 330, in the last Congress legislation that was the predecessor to this measure. After 2 days of hearings and consideration by the Committee on Veterans' Affairs, followed by another hearing and consideration by the Judiciary Committee, S. 330 as reported by the Veterans' Affairs Committee, which incorporated numerous changes that I developed based on the suggestions of witnesses as well as continuing consultation with many interested parties, was passed by the Senate on September 17, 1979. Unfortunately the House Committee on Veterans' Affairs, to which the measure was referred in the other body, took no action in connection with the measure until very late in the Congress when 2 days of hearings were held by a nonlegislative subcommittee. Nevertheless, I remain hopeful that, should the Senate again pass judicial review legislation, the Committee on Veterans' Affairs in the other body might take some action on the issue which could then serve as a basis for the development of some consensual approach on this important issue.

Mr. President, when S. 330 was before the Senate in the last Congress, the Congressional Budget Office estimated that its first-year cost would be \$2.9 million and the cost of the first 5 years would be \$42-million. Although that estimate has

not been updated, I see no reason for any change except to the extent necessary to reflect the effects of inflation.

Mr. President, as is more fully developed in a statement that I will ask be reprinted at the end of my remarks—the testimony that I presented in a November 13, 1980, hearing of the Subcommittee on Special Investigations of the House Committee on Veterans' Affairs—there are a number of reasons supporting the enactment of judicial review legislation, and I would like to briefly highlight some of them at this time.

Mr. President, one of the important reasons judicial review is needed is to help assure fairness to individual claimants before the VA. I do not believe that the current system that results in final, unappealable decisions by the Board of Veterans' Appeals is necessarily or uniformly unjust. What I do know, however, is that this system, together with the statutory limit of \$10 on the amount a claimant before the VA can pay an attorney for representation, leaves many disappointed claimants believing that they have been denied a full and fair opportunity to pursue their claims.

In addition to this perception of a denial of justice, Mr. President, is the very real chance that actual injustices occur under the current system, a problem that opportunity for judicial review would remedy. Although I know the VA claims adjudication system is set up to be supportive of the veterans—as it should be—the VA is a very large and complex Federal agency and unfair results will occur.

The case that was recently considered by the U.S. Court of Appeals for the District of Columbia Circuit, *DeMagno v. United States*, No. 79-1852, September 24, 1980, is a clear example of a real injustice occurring under the current system. In its opinion in this case, which is described in more detail in my testimony to the House Committee, the Court of Appeals stated:

"We have read and reread the administrative record and the briefs of the parties, and confess ourselves mystified at the action taken by the VA in the case. Either the VA is withholding, both from us and from DeMagno, all evidence which would justify its conduct, or this woman has been the victim of wholly arbitrary administrative ineptitude, leaving her impoverished for nearly four years." (Emphasis in original; footnote omitted.)

The most compelling lesson for me from the *DeMagno* case, aside from its example as a miscarriage of justice, is that, had it not been for a highly unusual aspect of the facts of that case which fit into a narrow window of judicial reviewability regarding certain insurance claim matters, there would not have been any opportunity for judicial review and redress of the injustices described by the court.

Mr. President, another reason that judicial review legislation is needed is that, although the Committees on Veterans' Affairs in both Houses do their utmost to oversee the activities of the VA, the limited resources of the committees do not allow a thorough review of all the issues confronted by such a large and complex agency. In the recent past, the VA has taken a number of administrative actions, of highly dubious legal validity, that have been designed to restrict benefits in the name of reducing spending. Although some of these actions, which are described in my testimony, have been corrected—but not fully remedied in all cases—by concerted action by the Committees on Veterans' Affairs, it would be far preferable if judicial review were available.

Aggrieved veterans should not be dependent for relief on the vagaries of congressional committee processes which, for all their virtues, cannot be fairly said to be designed to achieve or capable of achieving evenhanded dispensation of justice. Rather, if individual claimants had access to court to challenge administrative actions that they believed were unlawful, the appropriate judicial check on administrative action would be available.

Mr. President, a final important reason in support of judicial review is related to the status of the Board of Veterans' Appeals. Fundamental canons of due process, as guaranteed by the Constitution, require an independent review of administrative action affecting individuals' liberty or property interests. Although there are earlier court decisions suggesting that veterans' benefits are gratuities and not worthy of general due process protections, such a viewpoint is no longer valid, either philosophically—veterans benefits are earned by service in the military—or legally in light of a number of decisions rendered by the Supreme Court in the last decade holding that various statutory governmental benefits are legal entitlements and, thus, protected property interests of the recipient.

Mr. President, review by the BVA does not provide the required independent action required by due process. Although the BVA is not directly under the control of the Administrator of Veterans' Affairs, it is far too bound up with the agency, in many informal ways, to be truly independent and, more importantly, its independence is restricted by law. Under section 4004(c) of title 38, the Board is "bound in its

decisions by the regulations of the Veterans' Administration, instructions of the Administration, instructions of the Administrator, and the precedent opinions of the chief law officer." As I noted in my testimony, I have the highest regard for the professionalism and integrity of the outgoing General Counsel, but this does not alter the fact that allowing him to restrict the decisionmaking authority of the BVA significantly limits that body's independence. In this regard, I would note that the outgoing General Counsel, in his testimony on the issue of judicial review before the Veterans' Affairs Committees of both Houses, recognized this situation and agreed that it should be corrected, a position that I trust the incoming General Counsel will also support.

Mr. President, the foregoing discussion focused on positive reasons in support of judicial review legislation. There is at least one negative reason, in the sense of avoiding an undesirable result, that also supports its enactment. Under current practice, the VA's adjudicatory procedures are very informal and, as I noted earlier, supportive of veteran claimants. If an appropriate case were to reach the Supreme Court challenging the constitutionality of the bar to judicial review in section 211(a) of title 38, United States Code, and the VA's present adjudicatory procedures, I believe that the Court might well strike the 211(a) bar as an unconstitutional denial of due process and, in so doing, also dictate an entire new set of standards for the adjudicatory process, including access to court review, to meet due process requirements.

Such a result would be unfortunate, in my view, because many of the existing VA procedures are beneficial to veterans with claims before the VA. If, however, the Congress acts to provide judicial review, I believe that it can and should also act to maintain the beneficial aspects of existing procedures. That is what title I of the bill we are introducing is designed to do.

Mr. President, so that all Senators and the public will have a full understanding of the basis and need for judicial review legislation and of the provisions of the measure that is being introduced, I ask unanimous consent that there be printed in the Record at the conclusion of my remarks three items: First, testimony that I submitted to the Subcommittee on Special Investigations of the House Committee on Veterans' Affairs during its hearings last Congress on judicial review legislation; second, a section-by-section analysis of the provisions of the bill; and third, a document showing the changes that this measure would make in current law.

The material follows:

TESTIMONY OF SENATOR ALAN CRANSTON

Mr. Chairman, I very much appreciate the opportunity to present to your Subcommittee my views on a subject of great importance to me—the judicial review of final Veterans' Administration decisions.

Since I so strongly support the enactment of judicial review legislation, I am very pleased and gratified that the Subcommittee is holding this hearing to investigate this important matter and am hopeful that it will lead to the consideration of legislation by your Committee.

As you know, with the exceptions of insurance claims, housing program matters, and constitutional issues, veterans have been denied access to judicial review of determinations made by the Administrator of Veterans' Affairs since the enactment of the Economy Act of 1933, legislation which greatly limited veterans' benefits generally. Veterans, as a class, are the only recipients of major Federal benefits programs who are denied access to the courts after all administrative remedies have been exhausted. I strongly believe that this discrimination against veterans is inappropriate and unfair and that the current system fails to provide checks against arbitrary or capricious action by the agency, either with respect to determinations in individual cases or in the promulgation of regulations relating to benefits.

I will direct my comments to S. 330, the proposed "Veterans' Administration Adjudication Procedure and Judicial Review Act", which was passed by the Senate on September 17, 1979, and referred to this Committee, and to H.R. 6181, an identical House bill, which was introduced by Congressman Drinan on December 19, 1979. The Senate Committee on Veterans' Affairs, which I have been privileged to chair for the past four years, worked long and hard, together with Senator Gary Hart, to develop this legislation, and I believe that it represents a carefully reasoned approach to the issue of judicial review.

I. BASIC PURPOSE OF JUDICIAL REVIEW LEGISLATION

The basic purpose of S. 330 is to assure that veterans and other claimants before the VA receive all benefits to which they are entitled under law by providing them

with the opportunity for judicial review of final decisions of the Administrator of Veterans' Affairs denying claims for benefits, by codifying certain internal procedures of the VA relating to the adjudication of benefit claims, by requiring that VA rule-making processes comply with provisions of the Administrative Procedure Act relating to notice and comment, and my making it possible for veterans and other claimants to obtain the services of attorneys in pursuing their claims by allowing the payment of reasonable, limited attorneys' fees for services rendered after an initial denial.

II. NEED FOR LEGISLATION

A. Assuring fairness to individual claimants:

I believe that the need for this type of judicial check on the system is clear. Both of our Committees do their utmost to oversee and monitor the activities of the VA to ensure that veterans and their survivors and dependents receive the benefits to which they are entitled and that the programs are administered in a fair and effective manner. However, our limited resources do not allow us to review thoroughly every issue confronted by such a large and complex agency as the VA—which has an annual budget exceeding \$21 billion, employs over 215,000 people, pays cash benefits to over 6 million veterans and dependents each year, provides hospital, nursing home, and domiciliary—care to nearly 2 million patients a year, and provides approximately 18 million outpatient visits annually—or even to attempt to assure that each individual claimant receives his or her due.

My decision to support judicial review legislation was not based on a belief that the current system resulting in final, unappealable decisions by the Board of Veterans' Appeals leads to widespread injustices—although there is significant evidence that injustices warranting court review to occur. Rather, my support is primarily based on concerns raised by a number of witnesses and commentators that, whatever the merits of the original statutory preclusion of judicial review in 1933, the view that veterans' benefits are mere gratuities and that veterans have no interest in or right to such benefits warranting the protection afforded by access to court review seems highly questionable at this time, particularly in light of the protections, including access to court, now provided most all other beneficiaries of Federal benefits.

In addition, the tremendous volume of applications for benefits that are processed annually by the VA and the many thousands of appeals taken from unfavorable decisions—61,097 in fiscal year 1979, of which 22.8 percent were allowed—suggests that there is a significant opportunity for some injustices to occur. Under the present state of law, a veteran or other claimant aggrieved by a final VA decision is generally left without any further recourse.

The recent United States Court of Appeals for the District of Columbia Circuit decision in *DeMagno vs. United States* (No. 79-1852, Sep. 24, 1980) clearly illustrates the susceptibility of the present system to erroneous factual determinations and denials of benefits and the plight of those who have no recourse in the courts. In that case, the dependency and indemnity compensation benefits of the widow of a veteran who had died as a result of a service-connected disability were declared forfeit, under section 3503(a) of title 38, United States Code, on the basis of a determination that, in September 1972, she had knowingly made a false, material statement for the purpose of enabling another claimant improperly to receive benefits. In December 1977, the Board of Veterans' Appeals affirmed the forfeiture, which the payments made between the dates of the statement. In order to collect the amount of the payments made between the dates of the statement and the determination in October 1973 to suspend her DIC payments pending an investigation, the VA decided to withhold that amount from Mrs. DeMagno's VA-administered life insurance benefits, which were not subject to forfeiture and to which the judicial-review bar does not apply. On the basis of a special provision (38 USC 784) providing for judicial review of certain VA-administered life insurance claims, Mrs. DeMagno filed suit in Federal district court, but the district court held that, under section 211(a), it lacked jurisdiction over both the forfeiture decision and the VA's decision to offset insurance benefits, and granted the Government's motion to dismiss.

The court of appeals reversed the district court's ruling and held that, when the VA takes affirmative action to recover a claim against an individual by court action or, as in this case, by set-off, "the validity of the underlying basis of the action becomes open to judicial scrutiny."

Addressing the factual basis for the forfeiture, the three-judge appellate panel found the determination that Mrs. DeMagno's statement was knowingly false to be

totally unsupported by any evidence of record in her case. The panel's unanimous opinion stated:

"We have read and reread the administrative record and the briefs of the parties, and confess ourselves mystified at the action taken by the VA in this case. Either the VA is withholding, both from us and from deMagno, *all* evidence which would justify its conduct, or this woman has been the victim of wholly arbitrary administrative ineptitude leaving her impoverished for nearly four years." (Emphasis in original; footnote omitted.)

The DeMagno case portrays several defects in VA adjudications and the unfairness of the general preclusion of judicial review of those proceedings. First, although the court of appeals found in Mrs. DeMagno's favor on the jurisdictional issue, the fact is that, but for the highly unusual situation involving a set-off against insurance payments—which only a tiny fraction of even survivors' benefits cases are likely to involve and no veterans' claim would involve—an obvious injustice would have been permitted to have been permanently done.

Second, if the law had not barred direct judicial review of the forfeiture determination, a much more timely judicial focus on the lack of evidence to support that determination would have been available at the trial court level and Mrs. DeMagno might not have suffered the erroneous denial of DIC and insurance benefits during most of the 34-month period between the BVA's denial of the appeal and the VA's decision, after receipt of the court of appeals opinion, to restore payment of Mrs. DeMagno's benefits.

Third, I consider three aspects of the administrative procedures followed in this case to be highly questionable—the suspension of Mrs. DeMagno's DIC benefits pending investigation, with no notice of or opportunity to respond to the allegation of fraud for a ten-month period; the statement—made in the letter ultimately notifying her of the allegation of fraud and her right to a hearing and discouraging her from exercising that right—that, if she had "no new evidence to present. . . , a hearing will serve no useful purpose"; and the BVA's express reliance on evidentiary materials in the case file of the other claimant that were not disclosed to Mrs. DeMagno and were even withheld by the VA in the proceedings in the Federal district court. I believe that the exposure of VA proceedings to judicial scrutiny would provide the most effective, ongoing means for insuring that the legality of such dubious practices receives the thorough examination that fairness to VA claimants requires.

Because I am deeply concerned that the many deficiencies noted in the VA's handling of Mrs. DeMagno's case may be manifest in other forfeiture cases, I have asked the Comptroller General to undertake a review of a sample of such cases decided during the last five years. Although such a review may ultimately lead to legislative or administrative remedies to correct any unfair or illegal policies or practices that are found, I do not consider a sampling of past decisions to be nearly as effective or timely an approach to the prevention and correction of unfairness and injustice as providing an opportunity for judicial review.

Beyond the possibility of real injustices without a remedy, our Committee also developed judicial review legislation in order to address what some veterans, especially those whose claims for benefits are denied by the VA, perceive as a system with various inequitable features. The combination of no access to court review of the agency decisions coupled with a statutory limit of \$10 on the amount an attorney is permitted to receive for representing an individual with respect to a claim for benefits, which effectively precludes any meaningful non-legal-services attorney representation of veterans or other claimants in VA claims matters, has led many claimants over the years to believe that they have been relegated to second-class citizenship with respect to their claims for veterans' benefits.

Therefore, after reviewing all the various arguments and concerns relating to judicial review in seven days of hearings over three years, our Committee concluded that providing an opportunity for those aggrieved by VA decisions to have such a decision reviewed by a court, in a manner similar to that enjoyed by claimants before almost all other Federal agencies, was necessary to provide VA claimants with fundamental justice. To continue to inform a claimant before the VA that a benefit to which he or she was entitled by law could be wrongly—indeed arbitrarily or capriciously—denied and that there is no recourse to remedy such a denial, no longer seemed a viable response.

In addition, our Committee believed that the provision of judicial review, by opening the decisions of the VA to court scrutiny, would have a salutary effect on such decisions and the VA's decision-making process in general by involving the judiciary as an outside check on agency actions. Although the VA has the unique and vital mission of providing service to our Nation's veterans and their survivors, it is, at the same time, a large and complex Federal agency, and providing the

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opportunity for an independent, impartial body, in the form of the Federal courts, to review the processes and procedures of the agency should provide fuller reassurance of fair treatment to those with claims or other matters before the VA.

B. Review of questionable actions restricting benefits:

I would also like to stress my belief that, in addition to providing veterans with the opportunity for review of administrative denials of their individual claims, judicial review legislation can serve as an effective barrier to administrative actions, of dubious legal validity, designed to restrict benefits or exclude certain classes of veterans from eligibility for some benefits. In these times of fiscal austerity and the resulting need to achieve economies in all Federal programs, I am concerned that pressures to reduce spending may in some instances produce Executive Branch actions—restricting, withholding, or withdrawing a benefit—that are of questionable legality. It seems to me that the temptation to achieve savings through such possibly illegal action may well be more appealing when the agency knows that court review is unavailable to question its activities.

Certain incidents that have occurred in the past two years illustrate this point. During fiscal years 1979 and 1980, certain aspects of VA activities funded through nonentitlement accounts were at times hard-pressed, and both our Committees received reports of certain benefits—most frequently medications and medical supplies for VA outpatients and beneficiary travel reimbursements—being curtailed at various stations. In some cases, these benefits were reportedly withheld from service-connected disabled veterans.

The most striking incident in this regard was the decision of the Office of Management and Budget to require the VA to apply to VA beneficiary travel reimbursements the limitation under Public Law 96-86 on obligations for Executive Branch employee travel and transportation. At an April 16, 1980, hearing of our Committee, I asked the VA to provide us with a copy of whatever legal analysis had been made in support of the Administration's conclusion that the employee travel limitation was applicable to nonemployee travel. No legal memorandum or other documentation in support of that conclusion was ever submitted. While that unsupported determination remained in effect, we received reports of stations that were expecting to run out of funds for beneficiary travel cutting back on reimbursements and, as a result, some eligible veterans being denied this benefit and others being unable to travel to a VA facility to keep appointments after being notified that they would not be reimbursed. Lacking recourse to the courts, the veterans affected and the organizations representing them were powerless to prevent this action.

A further example of the type of administrative action that demonstrates the need for judicial review occurred several months ago following the submission of the President's March revised budget, in which it was proposed that the VA deny health care to military retirees for non-service-connected disabilities. Instead of waiting until the completion of Congressional action on fiscal year 1981 appropriations to implement this proposal, at least one VA Medical Center proceeded to put the proposal into effect. It seems unreasonable to me that an individual denied care as the result of this administrative action could, after exhausting available administrative appeal processes, go to a court of law for a determination as to the legality of this administrative decision.

Most recently, the VA's Department of Medicine and Surgery issued a directive—Circular 10-80-218—requiring that, in all cases in which medical care was provided during the past 5 years to non-service-connected veterans who are Federal employees with group health-insurance coverage, a review be undertaken to determine whether collection action should be pursued against the veterans concerned on the grounds that the oaths of inability to defray the costs of the care involved were falsely executed. In the agency's view, the receipt of VA care in such circumstances results in an indebtedness to the United States that should be collected from the veteran. Since VA-provided care is excluded from coverage under the health insurance policies involved, recoveries would be made from the veterans personally—from their non-insurance resources—and it was foreseeable that, in the cases of some veterans, collection would be made by way of offset against future payments of VA benefits, such as GI Bill and pension benefits, and even compensation in the case of a subsequently established service-connected disability. In such cases, the agency would make the factual determinations regarding ability to pay and the legal determinations regarding the existence of an indebtedness and the consequent requirement under section 3114 of title 38 to collect it by way of offset. In addition, under section 3301(g)(4) of title 38, the VA would have the option of disclosing to consumer reporting agencies (credit bureaus), for the purpose of adversely affecting the veteran's credit standing, information regarding what the VA may determine to be a delinquent indebtedness.

I am advised both that the legal underpinnings of the circular were open to serious question and that, if it were implemented, a veteran against whom such administrative collection actions were taken would probably be unable to obtain court review of the factual and legal determinations made adversely to him or her and of the administrative actions that I have described—including collection by offset or disclosure of information to consumer reporting agencies.

Fortunately, as the result of objections raised by both Committees and the veterans' service organizations, the VA has withdrawn and is reconsidering the circular. However, the possibility exists that it may be reissued, and the point is that there should have been other recourse.

Regardless of what, if any, action is taken with respect to this circular and the other issues I've highlighted, the point I wish to stress remains—that the possibility of legally questionable measures being implemented administratively to realize cost savings at the expense of veterans exists (and it is very conceivable to me that budgetary considerations may actually increase the pressures to take such steps) and the availability of recourse to the courts could prove to be a highly desirable and effective check on such agency actions.

In this connection, I would also note that, under section 4004(c), even the semi-independent BVA does not have the authority to question the legality of the regulations and instructions of the Administrator or the precedent opinions of the VA's General Counsel. Thus, in effect, the final arbiter of many legal issues relating to VA claims, including the legality of VA regulations (except with respect to constitutional questions), is the VA's General Counsel. Although I have the highest regard for the professionalism and integrity of the present General Counsel, I would note that that position itself is not an independent one and is not insulated by any statute, regulation, or organizational means from the budget-related pressures that I have just noted. Thus, the almost total judicial-review immunity accorded the legal decisions of the occupant of the VA General Counsel's office with respect to claims for benefits and regulations relating to benefits is, I believe, a fundamental defect in the present system. It seems clear that the present General Counsel, in his testimony before both Houses in support of judicial review of questions of law, also recognizes this defect and concurs that it should be corrected.

III. ARGUMENTS AGAINST JUDICIAL REVIEW LEGISLATION

Mr. Chairman, I am aware of two major arguments that have been advanced against S. 330—first, that judicial review could undermine the informal nature of adjudicatory proceedings within the VA and, second, that the provisions for attorneys' fees would allow attorneys to take advantage of veterans by obtaining contingency fees, thus permitting veterans' benefits to be paid to lawyers rather than to the veterans and other claimants who are entitled to those benefits.

A. VA adjudicatory proceedings:

On the first issue of undermining the adjudicatory process in place within the VA, we in the Senate worked very hard in the development of S. 330 to structure certain VA procedures and the judicial review process in order to avoid that result. I believe that this measure would serve to enhance and improve that administrative process by clarifying certain important matters that are expressed in rather confusing regulatory language, establishing certain new procedures that preserve the nonadversary nature of BVA proceedings, and explicitly exempting VA adjudicatory procedures from the formal rules of evidence. In completing action on such legislation, the Congress would have the opportunity to structure VA administrative and court review processes in a way which it deems appropriate. I consider this to be an important opportunity at the present time because the possibility exists that—in the absence of major statutory guidelines established by Congress—cases raising procedural due process issues under the Constitution may result in the courts filling the void by establishing some procedural safeguards as constitutionally mandatory. In fact, many commentators have suggested that, if a particularly compelling case were to present a constitutional challenge to the current preclusion of judicial review and allege a denial of due process, the Supreme Court, following decisions handed down over the past decade relating to the rights of beneficiaries of governmental programs, would decide that the preclusion is unconstitutional. In that event, it seems likely that the Supreme Court or other courts would proceed to determine what the due process clause requires in terms of the agency's internal adjudicatory functions and ultimate court review of them.

Rather than run these risks of having court-made law resolving such major issues, I believe that it is far preferable for the Congress to codify certain procedures. In this regard, I believe that the provisions of title I of S. 330, which were worked out during extensive deliberations with the VA and based on the recommendations of

many knowledgeable witnesses—including those representing the veterans' service organizations, all of whom supported the enactment of this title—reflect a reasonable approach that the courts would respect and that would preserve the desirable features of the VA's adjudicatory processes.

In addition, by establishing statutory rules and procedures for review of VA claims, the Congress has the opportunity to preserve the prime role of the Board of Veterans' Appeals as the expert fact finder in VA claims cases. I believe we have appropriately addressed this issue in title III of S. 330. Under the provisions of that title, the scope of court review on a question of fact would be limited to a review of the record of the case as developed by the Board of Veterans' Appeals to determine if the BVA's decision was "arbitrary, capricious, or an abuse of discretion". Even if a court were to determine that the BVA's decision were so poorly founded, the court would not initially have the power to make its own factual determination. Rather, the court would be required to remand the case to the BVA for reconsideration of the factual issues involved—including further development of the evidentiary record. Those procedures would insure that the fact-finding responsibilities of the Board and the informal nature of BVA adjudications are well protected.

B. Attorneys' fees issue:

On the second issue, that of attorneys taking advantage of veterans and their survivors and dependents, S. 330 would retain the existing \$10 limit on attorneys' fees at the initial claims' processing point. I believe that this limit on attorneys' fees is appropriate with respect to the initial claims stage because the initial procedures for applying for VA benefits are relatively uncomplicated, with the VA generally securing the relevant military records and evaluating the merits of the claim. In light of the availability of the highly trained service officers of the national veterans' organizations and other forms of free assistance, there would seem to be no need for the assistance of a private attorney to initiate the claims process by completing and filing an application. Continuing to discourage attorney representation at the initial application and decision stage would thus appropriately serve to protect claimants' benefits without prejudicing the claimant's ability to obtain a legal representative of his or her own choosing for purposes of reconsideration of, or appeal from, an initial denial of a claim.

Taking into account the various checks incorporated in title IV of S. 330 on unreasonable fees, I strongly believe that this approach is clearly preferable to the antiquated prohibitions in section 3404 of title 38 against the payment of attorneys' fees of more than \$10.

IV. ALTERNATIVE TO JUDICIAL REVIEW

One final issue I would like to address is the alternative to judicial review which has been suggested by some, that is establishing the Board of Veterans' Appeals as an independent agency, although not a court. This suggestion has been made to counter the argument that the need for judicial review is premised on the belief that the BVA, as a VA component subordinate to the Administrator, is too intimately connected with the VA to render impartial decisions. Although I believe that there is some merit in this proposal, I believe that the approach to judicial review embodied in S. 330 is far preferable for three reasons. First, I believe veterans should be treated equally with others who are entitled to benefits through programs established by the Federal Government, virtually all of whom have recourse to the Federal courts. Second, I believe that the opportunity for an informal, administrative appeal within the VA, which the BVA provides, is much too valuable to discard in the process of providing for fully independent review. Third, in order for that proposal to be truly equitable to veterans, branches of the BVA would have to be established throughout the country since Federal district courts are readily available in all parts of the country.

V. CONCLUSION

Mr. Chairman, I greatly appreciate having this opportunity to express my views on judicial review to your Subcommittee and to urge serious consideration of S. 330 by your Committee. I have greatly enjoyed and benefited from my close working relationship with this Committee over the years and look forward to continuing that dialogue in the future.

SECTION-BY-SECTION ANALYSIS

Section 1

Subsection (a) of section 1 provides that this Act may be cited as the "Veterans' Administration Adjudication Procedure and Judicial Review Act".

Subsection (b) of section 1 provides that, except when otherwise expressly provided, reference to a section or other provision shall be considered to be made to a section or other provision of title 38, United States Code, relating to veterans' benefits.

TITLE I—ADJUDICATION PROCEDURES

Section 101

Subsection (a) of section 101 would amend chapter 51 of title 38, United States Code, relating to applications for, the effective dates of, and the method of payment of veterans' benefits to add a new section 3007 codifying, for VA adjudication purposes, the burden of proof and reasonable doubt standards currently provided for by VA regulation (38 C.F.R. 3.102). These standards would be codified in order to ensure that the VA's present practices of making every reasonable effort to assist a claimant and construing the evidence favorably to the claimant are not abandoned in response to the provisions of title III of the bill proposing to amend title 38 to authorize court review. The new section 3007 would be added to chapter 51, as follows:

New section 3007.—Burden of proof; benefit of the doubt: Subsection (a) would provide that, except where otherwise provided by the Administrator in accordance with provisions of title 38, a claimant would have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that a claim is well grounded. Thus, as presently provided for in VA regulations (38 C.F.R. 3.102), the initial burden of going forward with evidence to establish all elements of a claim would be on the claimant. This subsection would not affect existing statutory or regulatory procedures that specify a different procedure relating to burden of proof (for example, the statutory presumptions relating to certain diseases in section 312 of title 38, United States Code, pursuant to which certain such diseases are considered service-connected without a showing that the particular disease existed during active duty service if it became manifest within a specified period after the individual's discharge from such service). In addition, this subsection is not intended to affect the obligation of the VA (pursuant to 38 C.F.R. 3.103) to provide complete assistance to the veteran or other claimant in the development of a claim.

Subsection (b) would provide, without shifting the burden specified in subsection (a) of this section, that, if, after reviewing all of the evidence in a case, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of the claim, the VA is to give the claimant the benefit of the doubt on each such issue, thus resolving the issue in favor of the claimant. This provision is derived from an existing VA regulation (38 C.F.R. 3.102) but the rules are simplified and the phrase "benefit of the doubt" is used in lieu of the phrase "reasonable doubt" in order to avoid confusion with the meaning of the latter phrase in the criminal law context.

Paragraph (1) of subsection (b) of section 101 would amend the table of chapters at the beginning of title 38, United States Code, and the table of chapters at the beginning of part IV of such title, relating to general administrative provisions, to strike, in the item relating to chapter 51, "Applications" and insert in lieu thereof "Claims" in order to reflect the change made in that chapter heading by paragraph (2) of this subsection.

Paragraph (2) of subsection (b) of section 101 would amend the heading of chapter 51 to read "Chapter 51—Claims, Effective Dates, and Payments" in lieu of "Applications, Effective Dates, and Payments" in order to indicate more accurately the subject matter of that chapter.

Paragraph (1) of subsection (c) of section 101 would amend the table of sections at the beginning of chapter 51 of title 38, United States Code, relating to claims, effective dates, and payments, to strike, in the item relating to subchapter I, "Applications" and insert in lieu thereof "Claims" in order to reflect the change made in that subchapter heading by paragraph (2) of this subsection.

Paragraph (2) of subsection (c) of section 101 would amend the heading of subchapter I of chapter 51 to read "Subchapter I—Claims" in lieu of "Subchapter I—Applications" in order to indicate more accurately the subject matter of that subchapter.

Subsection (d) of section 101 would amend the table of sections at the beginning of chapter 51 of title 38, United States Code, relating to claims, effective dates, and

payments to reflect the addition of the new section 3007 proposed to be made by subsection (a) of this section of the Committee bill.

Section 102

Would amend present section 3311, relating to the Administrator's authority to issue subpoenas, to provide that subpoenas authorized under that section may be served either by personal delivery to the person named or by registered or certified mail. This provision is derived from (and intended to have the same substantive effect as) section 205(d) of the Social Security Act, (SSA) (42 U.S.C. 405(d)).

Section 103

Clause (1) of section 103 would amend subsection (a) of present section 4001, relating to the composition of the Board of Veterans' Appeals, to increase from 50 to 65 the limitation on the size of the Board of Veterans' Appeals membership in order to enhance the Board's ability to handle the increased workload, in the form of longer, more detailed opinions and court-ordered remands for further development of the record in individual cases that the judicial review of VA decisions (as would be authorized by the amendments proposed to be made by title III of the Committee bill) is expected to generate; to make a technical amendment in the statutory description of members of the Board (striking "associate" in the description of members of the Board based on the VA's explanation that there is no difference between "members" and "associate members"); and to require expressly that the Board dispose of appeals properly before it in "a timely manner."

Clause (2) of section 103 would further amend present section 4001 by adding a new subsection (c), as follows:

New subsection (c): Would require the Chairman of the Board of Veterans' Appeals to submit a report to the appropriate committees of Congress, not later than February 1, 1980, and annually thereafter, on the Board's activity for the prior fiscal year, together with a projection for the fiscal year in which the report is submitted and the subsequent fiscal year. The report must include detailed information on the Board's workload, including a report on the average length of time cases were before the Board, and an evaluation of the Board's ability, based on existing and projected personnel levels, to dispose of cases before it in "a timely manner"; as expressly required by the amendment to subsection (a) of present section 4001 as proposed to be made by clause (1) of section 103 of the Committee bill.

Section 104

Would amend present section 4002, relating to the assignment of members of the Board of Veterans' Appeals, to make a technical amendment in the statutory description of members of the Board (that is, to delete "associate" from the description of members of the Board for the reason set forth in the analysis of clause (1) of section 103 of the Committee bill (above)).

Section 105

Would amend subsections (a) and (b) of present section 4003, relating to determinations by the Board of Veterans' Appeals, to require that the Board, before reversing its prior decision in an individual case on the basis of additional office information from the service department concerned, to provide the claimant with notice of such additional information together with an opportunity to be heard in connection with such information.

Section 106

Would amend present section 4004, relating to the jurisdiction of the Board of Veterans' Appeals, to codify a number of existing practices of the Board and to clarify other practices and procedures in conjunction with court review of VA decisions, as would be authorized by the amendments made by title III of the Committee bill.

Clause (1) of section 106 would amend subsection (a) of present section 4004, relating to a claimant's right to one appeal, which is to be decided by the Board, to provide claimant with appeals before the Board with the express statutory right to an opportunity for a hearing before the Board, and to require that Board decisions be based exclusively on evidence and material of record in the proceeding and on applicable provisions of law. These changes codify the general practice now followed by the Board, derived from the provisions of present section 4005(a) as to a right to a hearing (made express in 38 CFR 19.133(a)) and present section 4005(d)(5) as to the record, which provision is proposed to be deleted by section 107 of the Committee bill.

Clause (2) of section 106 would amend subsection (b) of present section 4004, relating to the reopening of Board decisions, to eliminate the requirement that new

and material evidence sufficient to allow the Board to reopen a previously disallowed claim be in the form of "official reports from the proper service department" (this change is consistent with the Board's current practice of allowing previously denied claims to be reopened on the basis of new and material evidence from any source, although the applicable regulation, 38 CFR 19.155, does not clearly articulate this process; and to specify that a judicial decision (pursuant to the new judicial review provisions added by the amendments made by title III of the Committee bill) upholding, in whole or part, a prior decision of the Board disallowing a claim shall not diminish the Board's discretionary authority to reopen a claim on the basis of new and material evidence. This latter provision is designed specifically to make it clear that nothing in the new provisions authorizing judicial review is intended to allow the doctrine of *res judicata* to affect the VA's "open file" system of claims adjudication.

Thus, the fact of an adverse court ruling on a claim in no way intended to preclude a veteran or other claimant from continuing to pursue the claim by gathering and offering new and material evidence sufficient to reopen the matter.

Clause (3) of section 106 would amend subsection (d) of present section 4004, relating to the form of Board decisions, by requiring that Board decisions state separately findings of fact and conclusions of law on each material issue in the case, and that the Board mail a copy of its final decision to the last known address of the claimant and of the claimant's authorized representative, if any. These requirements would codify current Board practices not expressly provided for in regulation, and provide a statutory basis for procedures that would precede and should facilitate court review of a matter appealed to court. The date on which the decision is mailed to the last known address of the claimant and the claimant's authorized representative would serve as the date from which time would begin to run on the 180-day period following a Board decision that would be allowed for the commencement of a civil action under new section 4025 of title 38 (as added by subsection (a) of section 302 of the Committee bill). The provision relating to the contents of the Board's decision, which is derived from the Administrative Procedure Act (APA) (5 U.S.C. 557(c)), is intended to assure that decisions of the Board are sufficiently explicit and detailed so as to enable the claimant to understand clearly the basis of the Board's action and, if the case of an appeal to a court, to enable the claimant to state specific grounds for disputing the decision; and to provide the reviewing court with a basis to understand and interpret the decision of the Board.

Section 107

Would amend present section 4005(d)(5), relating to the Board's disposition of appeals, to delete the requirement that the Board base its decision on the entire record because that requirement would be included in present section 4004(a) by an amendment made by section 106(1) of the Committee bill.

Section 108

Would amend present section 4009, relating to the obtaining of independent medical opinions by the Board in medically complex or controversial cases, to add a new subsection (c), as follows:

New subsection (c): Would provide the claimant with the right to request an independent medical opinion when the Board has a case in which there is a substantial disagreement between the substantiated findings or opinions of two physicians with respect to a material issue in the case and the Board cannot resolve the disagreement in any other way (for example, by interrogators to one or both physicians, probing the basis for such physician's findings or opinion). In the case of a denial of such a request, the Board would be required to provide the claimant and the claimant's authorized representative, if any, with a statement of its reasons for denying a request for an IMO under this subsection, but the Board's decision on such a request would be committed to agency discretion and thus would be final and not subject to judicial review.

Section 109

Would amend chapter 71 of title 38, United States Code, relating to the Board of Veterans' Appeals by adding two new sections, one establishing certain procedures to be followed in adjudicatory proceedings within the VA (largely derived from provisions of APA (5 U.S.C. 554, 555, and 556)) and the other setting forth requirements for the Administrator to apprise claimants of their procedural rights before the VA.

Subsection (a) of section 109 would amend chapter 71 by adding two new sections, as follows:

New subsection 4010.—Adjudication procedures: Subsection (a) would authorize the Administrator, in any hearing, investigation, or proceeding in the VA, in connection with a claim for benefits under laws administered by the VA, to administer oaths, examine witnesses, and take evidence. This fundamental authority codifies existing VA practice, derived, insofar as subpoenaed witnesses are concerned, from present section 3311 and not required from a specific regulation, and is based on an APA provision (5 U.S.C. 556 (c)) and is similar to SSA section 205(b) (42 U.S.C. 405(b)).

Subsection (b) would provide for the admission of any evidence in VA proceedings, including before the Board, even evidence that would be inadmissible under the rules of evidence applicable in judicial proceedings, but would also authorize the Administrator to prescribe regulations allowing exclusion of irrelevant, immaterial or unduly repetitious evidence. This provision, which is based on similar APA (5 U.S.C. 556(d)) and SSA provisions (42 U.S.C. 405(b)), generally codifies the existing VA regulation, 38 CFR 19, 133(c).

Subsection (c) would specify certain procedural rights of claimants in proceedings before the Board or Veterans' Appeals, the first four of which (clauses (1) through (4) below) are derived from the APA (5 U.S.C. 556(d)).

Clause (1) of subsection (c) would give the claimant or the claimant's authorized representative the right to examine the contents of the case files and all documents and records that the VA plans to use in the proceeding and, on the payment of a fee, prescribed pursuant to present section 3302(b), not to exceed the direct cost of duplicating the materials, the right to obtain copies of all such materials.

Clause (2) of subsection (c) would give the claimant or the claimant's authorized representative the right to present witnesses and evidence restricted only by regulations of the Administrator relating to irrelevant, immaterial, or unduly repetitious evidence as authorized by proposed subsection (b) of this section.

Clause (3) of subsection (c) would give the claimant or the claimant's authorized representative the right to make arguments to the Board, both orally and in the form of a written brief or similar document, on both substantive and procedural issues.

Clause (4) of subsection (c) would give the claimant or the claimant's authorized representative the right to submit rebuttal evidence.

Clause (5) of subsection (c) would give the claimant or the claimant's authorized representative the right to present medical opinions as part of the case and to request an independent medical opinion pursuant to new subsection (c) of present section 4009 (as added by section 108 of the Committee bill).

Clause (6) of subsection (c) would give the claimant or the claimant's authorized representative the right to serve on any person written interrogatories that would have to be answered in writing separately and under oath unless the person served makes an objection to the Administrator. (Other provisions of this subsection discussed below provide specific procedures for objection to and enforcement of such interrogatories.)

Subsection (c) would further provide, in a final paragraph, that the fee provided for in clause (1) of this subsection for the reproduction of the contents of case files and all materials that the VA plans to use in the proceeding may be waived, pursuant to regulations of the Administrator, either on account of a party's inability to pay or for other good cause. In addition, the final paragraph of the subsection would provide procedures that would apply in conjunction with the use of interrogatories authorized in clause (6) of this subsection. In the event an individual served with interrogatories objects to some or all of the interrogatories, the Administrator would be required, pursuant to regulations which the Administrator must prescribe establishing standards consistent with standards for protective orders under Rule 26(c) of the Rules of Civil Procedures for the United States District Courts, to evaluate the objection and either order the interrogatories to be answered as served or as modified by the Administrator or order that the interrogatories need not be answered. In this manner, the Administrator would be available to protect against the use of interrogatories to harass or unduly burden the person served with the interrogatories. This paragraph would also provide that, if a person served with interrogatories under this section falls to answer or to provide responsive answers and the party serving the interrogatories shows the general relevance and reasonable scope of the evidence sought, the Administrator is to issue a subpoena pursuant to present section 3311 of title 38 with enforcement pursuant to present section 3313 of title 38, United States Code, to require the person served with the interrogatories to appear at a disposition on written questions at a location within 100 miles of the witness' residence or place of work. This procedure for enforcing the interrogatories, together with the check provided by the Administrator's evaluation of any objection, is designed to prevent abuse of this discovery tool while providing a claimant with a

means of obtaining relevant evidence that would otherwise be unavailable to the claimant. The provisions relating to the use of interrogatories are proposed in lieu of allowing a claimant to subpoena a witness to appear at a Board hearing for the purpose of cross-examination by the claimant or the claimant's authorized representative because of concern that such cross-examination would not be consistent with the goal of conducting proceedings by the Board in a nonadversarial fashion.

Subsection (d) would provide authority for a hearing officer in any VA proceeding to disqualify himself or herself because of personal bias or other cause and also would provide authority for a party to challenge a hearing officer on such basis. This provision is derived from the APA (5 U.S.C. 556(b)).

Subsection (e) would specify that the administrative record in a case would consist of the transcript or recording of testimony and the exhibits, all papers and requests filed in the proceeding, and the decision of the Board, and would require the Administrator, upon payment of a reasonable fee for the cost of duplicating, pursuant to present section 3302(b) of title 38, to copy the contents of the record for the claimant. The duplicating fee would be waivable on account of a party's liability to pay or for other good cause shown.

Subsection (f) would specify that, notwithstanding any other provision of law, the adjudication and hearing procedures contained in title 38, and in regulations prescribed by the Administrator are exclusive. This provision is designed to preclude judicial incorporation of other procedures from the Administrative Procedure Act or elsewhere in order to assure that VA procedures remain informal and nonadversarial in nature.

New section 4011.—Notice of procedural rights: Would require the Administrator to provide, at each stage of the proceedings before the VA, notice, in easily understandable language, to a claimant of procedural rights and the procedures available to obtain various opportunities for review. This provision is designed to assure that at each critical juncture in the adjudication/appeals process, the claimant is specifically notified of his or her rights, at that level and of remaining available options; and to assure that, where there are substantial populations of veterans with limited English-language proficiency, this notice is provided in a language other than English, such as Spanish, which is spoken by a significant percentage of the clientele of the particular VA facility.

Subsection (b) of section 109 would amend the table of sections at the beginning of chapter 71 to reflect the addition of new sections 4010 and 4011 made by the amendments in subsection (a) of this section of the Committee bill.

Section 110

Would require the Administrator to conduct a study of alternative methods of providing speedier claims resolution at locations convenient to claimants' residences. The study would include two alternative procedures: First, in at least three VA regional offices, a procedure utilizing an intermediate review panel of regional office personnel from the Department of Veterans' Benefits, which would conduct a de novo review of the claim prior to any appeal to the Board of Veterans' Appeals; and, second, in at least three other VA regional offices, an enhanced schedule of visits by traveling panels of the Board of Veterans' Appeals (on at least a quarterly basis). The Administrator would be required to report to the Congress on the results of the study, including an evaluation of the cost factors associated with each alternative and the impact on the workload of the regional offices and the Board of Veterans' Appeals resulting from each alternative, together with any recommendations for administrative or legislative action, or both, as may be indicated by the study.

TITLE II—VETERANS' ADMINISTRATION RULE MAKING

Section 201

Subsection (a) of section 201 would amend subchapter II of chapter 3 of title 38, United States Code, relating to various administrative matters pertaining to the Veterans' Administration, by adding a new section 221, as follows:

New section 221.—Rule making: Would provide that, notwithstanding the preclusion in section 553(a)(2) of title 5, United States Code, of matters involving "loans, grants, benefits, or contracts" from Administrative Procedure Act rulemaking procedural requirements, the VA's rulemaking procedures must be in compliance with the provisions of the Administrative Procedure Act section relating to rule making, section 553 of title 5, United States Code. This section would generally codify the current VA regulations, 38 CFR 1.12.

Subsection (b) of section 201 would amend the table of sections at the beginning of chapter 3 of title 38, United States Code, relating to general administrative matters.

pertaining to the Veterans' Administration, to reflect the addition of the new section 221 proposed to be made by subsection (a) of this section of the Committee bill.

TITLE III—JUDICIAL REVIEW

Section 301

Would amend section 211(a) of title 38, United States Code, relating to decisions by the Administrator, which generally precludes judicial review of decisions of the Administrator in matters relating to claims for benefits under laws administered by the VA, to add to the matters to which such preclusion does not apply, chapter 72, the new judicial review chapter proposed to be added by section 302 of the Committee bill.

Section 302

Subsection (a) of section 302 would amend part V of title 38, United States Code, relating to VA boards and departments, to add a new chapter, chapter 72, entitled "Judicial Review", which would authorize and prescribe procedures for access to the Federal court system for review of certain VA decisions and would consist of new sections 4025 through 4029, as follows:

New section 4025.—Jurisdiction: Would define the reviewing court's jurisdiction to review a case involving a claim for benefits under laws administered by the Veterans' Administration.

Subsection (a) would authorize judicial review of a "final decision" (as defined in subsection (c) of this new section) in a matter involving a claim for benefits under laws administered by the Veterans' Administration. A civil action seeking such review could be brought in Federal district court in either the home district of the claimant or in the district court where the Board of Veterans' Appeals is situated (presently the District of Columbia), and must be brought within 180 days (the same period as is allowed for bringing an action in Federal court in connection with a tort claim against the United States, as provided for in 28 U.S.C. 2401(b), following final denial of such claim by the Federal agency involved, as required by 28 U.S.C. 2675(a)) after the notice of the Board of Veterans' Appeals decision is mailed to the claimant pursuant to new section 4004(d) (as proposed to be added by clause (3) of section 106 of the Committee bill).

Subsection (b) would provide that, in matters not directly involving a claim for benefits, present section 211(a), which generally precludes judicial review of decisions of the Administrator, shall not bar a Federal civil action that otherwise would be authorized by law. This provision is intended to make clear that nothing in section 211(a) operates to bar judicial challenges to VA regulations, practices or procedures that would be open to such challenge if carried out by any other Federal agency. Thus, the provision is not a grant of jurisdiction and is in no way intended to vitiate any available defenses, such as standing, ripeness, and failure to exhaust administrative remedies, in civil actions for the review of Federal agency conduct. Rather, this provision is intended to recognize and codify an emerging body of case law (for example, the decision of the United States Court of Appeals for the Sixth Circuit in *Wayne State University v. Cleland*, 590 F. 2d 627 (6th Cir. 1978), holding that section 211(a) does not preclude court review of the Administrator's authority to promulgate particular regulations) to the effect that present section 211(a) precludes judicial review of only those decisions that Administrator makes in the administration of a statute providing benefits to veterans or other claimants.

Subsection (c) would define "final decision of the Administrator", as used in subsection (a) of this new section, to include not only a decision on the merits pursuant to section 4004(a), as it is proposed to be amended by section 106 of the Committee bill, but also a refusal to reopen a claim pursuant to section 4004(b), as it is proposed to be amended by section 106 of the Committee bill, or a refusal on the basis of nonconformity with present chapter 71 provisions relating to form * * *.

* * * * *

Clause (3) of subsection (a) would define a reviewing court's authority to hold unlawful and set aside decisions, findings, and conclusions of the Administrator. Specifically, a reviewing court would be empowered to reverse a decision of the Administrator if such a decision is found to be: (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege or immunity; (C) in excess of statutory jurisdiction, authority or limitations, or in violation of a statutory right; or (D) without observance of procedure required by law. As noted above, this authority to reverse is largely derived from the APA; however, it is specifically limited in cases where a reviewing

court finds the Administrator's decision on a factual issue to be arbitrary, capricious, or an abuse of discretion so as to require the court, before reversing the decision, to specify where it finds the record to be deficient and to remand the case, once, for a time-limited period, to allow the Administrator either to reconsider the decision or substantiate the record. It is the Committee's intention that these limits on a reviewing court's authority to reverse a decision of the Administrator on a factual issue, together with the limitation on a court's review of factual issues to an evaluation for arbitrariness, capriciousness, or abuse of discretion, should serve to restrict court review of factual matters more tightly than is the case where review is authorized (as in the APA, 5 U.S.C. 706) to determine whether a Federal agency's decision on a factual issue is "supported by substantial evidence". Thus, the role of the Board of Veterans' Appeals as the primary expert arbiter of factual matters involving claims for VA benefits would be preserved.

Subsection (b) would incorporate the rule of prejudicial error from the APA (5 U.S.C. 706) in order to define further a reviewing court's role. Thus, pursuant to this rule, a court would be expected to disregard errors in the administrative record that are not significant to the outcome of the matter.

Subsection (c) would clarify a reviewing court's role in relation to questions of fact decided by the Administrator by specifying that in no event shall such findings be subject to a trial de novo in the reviewing court.

Subsection (d) would provide that, in reviewing a matter resolved by the VA solely on the basis of a failure to conform to VA regulations or procedures, the reviewing court may consider only those issues relating to the validity of or conformity with the regulation or procedure. Thus, if a court were to uphold the validity of a regulation or procedure and its application to the facts of a case, the matter would be ended; but if, on the other hand, the court were to rule that the regulation or procedure is unlawful, the underlying claim for benefits must be returned to the VA for its consideration, and the VA's role as the principal arbiter of VA claims matters would thus be preserved.

New section 4027.—Remands: Would provide for three different types of remands (two mandatory and one discretionary), in addition to the mandatory remand provision to be provided for under new section 4026(a). Under the first, the court would be required, at the request of the Administrator, to remand the case, after it is appealed to court and before the Administrator files an answer, for a single reconsideration by the Administrator, which must be completed within 90 days or the matter would be returned to court. This provision is derived from a similar one in the SSA (42 U.S.C. 405(g)) but modified to place a specific limit on the amount of time allowed before the case must be returned to court. The second remand provision would allow the reviewing court, in its discretion, to remand a case for further action after the Administrator has filed an answer. The third remand provision would require a court to remand a matter when either party applies for leave to adduce further evidence and shows "good cause" for the remand. In the Committee's view, the burden of showing good cause for the remand should be applied to protect parties and administrative and judicial processes from dilatory practices but not so as to create undue impediments to the Administrator's consideration of additional evidence bearing on the merits of a claim. The new section would thus authorize a reviewing court to specify a time period within which the Administrator must act on a matter remanded under either the second or third remand provisions in this new section.

New section 4028.—Survival of actions: Would provide that actions brought under new section 4025 would survive the tenure of any individual as Administrator.

New section 4029.—Appellate review: Would provide that decisions of district courts pursuant to the new judicial review chapter would be subject to review in higher Federal courts in the same manner as other civil judgments.

Subsection (b) of section 302 would amend the table of chapters at the beginning of title 38, United States Code, and the table of chapters at the beginning of part V of such title, relating to boards and departments, to reflect the addition of the new chapter 72 proposed to be made by subsection (a) of this section of the Committee bill.

Section 303

Would amend present section 1346 of title 28, United States Code, relating to the jurisdiction of Federal district courts when the United States is the defendant, to provide that the exclusion contained therein limiting the jurisdiction of Federal district courts in matters involving pensions shall not apply to VA pension matters. This is a conforming amendment to effectuate the purpose of the new chapter 72 that would be added by section 302 of the Committee bill.

TITLE IV—ATTORNEYS' FEES

Section 401

Would amend present section 3404 of title 38, United States Code, relating, in connection with VA proceedings, to the recognition of agents and attorneys and to attorneys' fees, to revise the present title 38 limitation of \$10 for claimants' attorneys' fees by providing for the approval by the Administrator of reasonable attorneys' fees, within certain specified amounts for representation of individuals before the Veterans' Administration and for approval by the court of a reasonable attorneys' fees in cases appealed to court.

Clause (1) of section 401 would amend present subsection (c) of present section 3404, to provide for approval by the Administrator of attorneys' fees above the present \$10 maximum for services rendered in representing a claimant following the issuance by the Administrator of a statement of the case (a formal explanation of an initial denial of a claim) pursuant to present section 4005(d), but would retain the \$10 maximum limitation for cases resolved upon the initial proceeding at the regional office level. With respect to claims resolved within the VA but following the issuance of the statement of the case, the Administrator's approval of an attorneys' fee is limited to the lesser of:

(A) the fee agreed upon by the claimant and the attorney, or

(B)(1) \$500 (an amount which could be increased administratively by the Administrator in future years as warranted by changed economic conditions) except that a greater amount may be approved by the Administrator in an individual case involving extraordinary circumstances warranting such a higher fee, or

(ii) If the claimant and attorney have entered into a contingent-fee agreement, an amount not in excess of 25 per centum of the total amount of past-due benefits awarded.

Thus, approved fees for legal representation before the VA following the issuance of a statement of the case will generally be limited to a maximum of \$500 unless the claimant and attorney have entered into a contingent-fee agreement and the matter is resolved in a manner favorable to the claimant, in which case the limitation would be 25 per centum of any past-due benefits awarded in the claim. The Committee does not anticipate that the Administrator will have occasion to approve a fee in excess of \$500 on the basis of "extraordinary circumstances" except in the most unusual of cases where an attorney is able to demonstrate that the facts and circumstances of the cases were so markedly different, in terms of complexity or difficulty, from the average case before the Administrator that an exceptional amount of time was legitimately required to prepare and present it.

Clause (2) of section 401 would further amend present section 3404 of title 38, United States Code, by adding six new subsections, (d) through (i), as follows:

New subsection (d): Would define the court's role in approving attorneys' fees in cases appealed to court under the new judicial review chapter as proposed to be added by section 302 of the Committee bill. In a case that is resolved in a manner favorable to the claimant (as that result is defined in new subsection (h) of this section), the court may approve a reasonable fee, with the limitation that, if the claimant and attorney have entered into a contingent-fee agreement, the amount of the fee is limited to 25 per centum of the total amount of past-due benefits awarded in the case. In the event that a matter is not resolved in a manner favorable to a claimant in court, the reviewing court may approve a limited reasonable fee, not to exceed \$750 taking into consideration the extent to which success appeared reasonably probable when the action was filed. Of course, where the claimant and attorney have entered into a contingent-fee agreement, no fee could be approved unless court review ultimately results in an award of past-due benefits.

New subsection (e): Would provide authority for the Administrator to authorize payment to an attorney from any past-due benefits that are awarded by the Administrator or a court but would specifically preclude the VA from making payments out of any future benefits accruing to a claimant on the basis of the action.

New subsection (f): Would provide for court review of an approval of a fee award by either the Administrator or a court. Where the matter is resolved within the VA and the Administrator approves an award, the amount approved may be challenged as reflecting an abuse of discretion by an action brought by either the claimant or the attorney in the Federal district court in the claimant's home district. Where the fee is approved in a matter appealed to court, either the claimant or the attorney could make a motion, in the United States district court where the appeal was considered, within 30 days after the fee is approved.

New subsection (g): Would limit the applicability of the new attorneys' fees section, section 3404 (as proposed to be amended by this section of the Committee bill), to cases involving claims for benefits under laws administered by the VA.

Thus, in all other types of cases (for example, constitutional challenges to regulations, Freedom of Information Act cases, and other claims for relief other than VA benefits) where no claim for benefits is involved, the fee agreement between the individual and the attorney would not be restricted by the provisions of this section.

New subsection (h): Would provide that, for the purposes of this section, a claim is to be considered as having been resolved favorably to a claimant when any or all of the relief sought is granted.

New subsection (i): Would provide that a court may, in its discretion and as an extraordinary remedy, allow a prevailing party, other than the Administrator, reasonable attorneys' fees as part of the costs awarded after the decision. This provision is intended to permit a court to evaluate all of the circumstances of a claim and, in particular, the VA's basis for denying the relief requested and its conduct with respect to the claimant. The Committee's intention is that the court's evaluation of the VA's actions be similar to that undertaken by courts in Freedom of Information Act cases when the issue to be resolved is whether the governmental agency involved had a reasonable or colorable basis in law for its action (for example, the analysis on *Keye v. Burns*, 411 F. Supp. 897, 902 (S.D. N.Y. 1976) cited with approval in *Cueno v. Rumsfeld*, 553 F. 2d 1360 (D.C. Cir. 1977)). Accordingly, there should seldom be an award of attorneys' fees under this provision; and award would be appropriate only upon a finding by a court that the VA had been "recalcitrant" in its denial of a valid claim or had otherwise "engaged in obdurate behavior" in the adjudication of the claim. One situation that might, in particular cases, warrant such a finding and an award of attorneys' fees would be where the reviewing court has found a factual determination of the Administrator to be "arbitrary, capricious or an abuse of discretion" and remands the matter to the VA pursuant to proposed new section 4026 (as proposed to be added by section 302 of the Committee bill), following which the matter is returned to the court with the Administrator's finding unchanged and with no further substantiation or development of the record.

Section 402

Would amend present section 3405 of title 38, United States Code, relating to penalties for certain acts, to delete a gender reference and to strengthen this provision by making it a Federal criminal offense for an attorney or other person willfully and intentionally to defraud a VA claimant.

TITLE V—EFFECTIVE DATES

Section 501

Would make the Act effective on the first day of the month beginning 180 days after the date of enactment.

Section 502

Would allow for judicial review, pursuant to proposed new section 4025 (as proposed to be added by section 302 of the Committee bill), of decisions of the Board of Veterans' Appeals rendered on or after January 1, 1977, and prior to the effective date of the Act. This section also specifies that any appeals of such decisions rendered prior to the effective date of the Act must be brought within 180 days after the effective date of the Act or after mailing of notice by the Administrator to the claimant of the right to such an appeal, whichever is later.

CHANGES THAT WOULD BE MADE IN EXISTING LAW

Changes in existing law made by this legislation are shown as follows (existing law proposed to be omitted is enclosed in brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

* * * * *

Chapter 85—DISTRICT COURTS; JURISDICTION

Sec.

* * * * *

1346. United States as defendant.

* * * * *

§ 1346. United States as defendant.

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort. For the purposes of this paragraph, an express or implied contract with the Army and Air Force exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension *except as provided for in chapter 72 of title 38*.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 7426 or section 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1954.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

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TITLE 38—UNITED STATES CODE

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PART I—GENERAL PROVISIONS

* * * * *

Chapter 3—VETERANS' ADMINISTRATION; OFFICERS AND EMPLOYEES

Subchapter I—Veterans' Administration

Sec.

201. Veterans' Administration and independent agency.

202. Seal of the Veterans' Administration.

203. Availability of appropriations.

Subchapter II—Administrator of Veterans' Affairs

- 210. Appointment and general authority of Administrator; Deputy Administrator.
- 211. Decisions by Administrator; opinions of Attorney General.
- 212. Delegation of authority and assignment of duties.
- 213. Contracts and personal services.
- 214. Report to the Congress.
- 215. Publication of laws relating to veterans.
- 217. Studies of rehabilitation of disabled persons.
- 218. Standards of conduct and arrests for crimes at hospitals, domiciliaries, cemeteries, and other Veterans' Administration reservations.
- 219. Evaluation and data collection.
- 220. Coordination of other Federal programs affecting veterans and their dependents.
- 221. Rule making.

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Subchapter II—Administrator of Veterans' Affairs

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§ 211. Decisions by Administrator; opinions of Attorney General

(a) On and after October 17, 1940, except as provided in section 775[,] and 784 and chapter 72 of this title, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

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§ 221. Rule making

Notwithstanding the provisions of subsection (a)(2) of section 553 of title 5, the promulgation of rules and regulations by the Administrator shall be subject to the requirements of section 553 by title 5.

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PART IV—GENERAL ADMINISTRATIVE PROVISIONS

Chapter	Sec.
51. [Applications] <i>Claims</i> , Effective Dates, and Payments.....	3001
53. Special Provisions Relating to Benefits.....	3101
55. Minors, Incompetents, and Other Wards.....	3201
57. Records and Investigations.....	3301
59. Agents and Attorneys.....	3401
61. Penal and Forfeiture Provisions.....	3501

Chapter 51—[APPLICATIONS] *CLAIMS*, EFFECTIVE DATES, AND PAYMENTSSUBCHAPTER I—[APPLICATIONS] *CLAIMS*

Sec.
3001. Claims and forms.
3002. Application forms furnished upon request.
3003. Incomplete applications.
3005. Joint applications for social security and dependency and indemnity compensation.
3006. Furnishing of information by other agencies.
3007. <i>Burden of proof; benefit of the doubt.</i>
3010. <i>Effective dates of awards.</i>

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Subchapter I—[Applications] *Claims*

§ 3001. Claims and forms

(a) * * *

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§ 3007. Burden of proof; benefit of the doubt

(a) Except when otherwise provided by the Administrator in accordance with the provisions of this title, a claimant for benefit under laws administered by the Veterans' Administration shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded.

(b) When, after consideration of all evidence and material of record in any proceeding before the Veterans' Administration on a claim for any benefit under laws administered by the Veterans' Administration, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of such claim, the benefit of the doubt in resolving each such issue will be given to the claimant, but nothing in this section shall be constructed as shifting from a claimant to the Administrator the burden described in subsection (a) of this section.

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Chapter 57—RECORDS AND INVESTIGATIONS

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Subchapter II—Investigations

§ 3311. Authority to issue subpoenas

For the purposes of the law administered by the Veterans' Administration, the Administrator, and those employees to whom the Administrator may delegate such authority, to the extent of the authority so delegated, shall have the power to issue subpoenas for and compel the attendance of witnesses within a radius of one hundred miles from the place of hearing, to require the production of books, papers, documents, and other evidence, to take affidavits, to administer oaths and affirmations, to aid claimants in the preparation and presentation of claims, and to make investigations and examine witnesses upon any matter within the jurisdiction of the Veterans' Administration. Any person required by such subpoena to attend as a witness shall be allowed and paid the same fees and mileage as are paid witnesses in the district courts of the United States. Subpoenas authorized under this section shall be served by any individual authorized by the Administrator by (1) delivering a copy thereof to the individual named therein, or (2) mailing by registered or certified mail addressed to such individual at such individual's last dwelling place or principal place of business. A verified return by the individual so serving the subpoena setting forth the manner of service, or, in the case of service by registered or certified mail, the return post office receipt therefor signed by the individual so served shall be proof of service.

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Chapter 59—AGENTS AND ATTORNEYS

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§ 3404. Recognition of agents and attorneys generally

(a) The Administrator may recognize any individual as an agent or attorney for the preparation, presentation, and prosecution of claims under laws administered by the Veterans' Administration. The Administrator may require that individuals, before being recognized under this section, show that they are of good moral character and in good repute, are qualified to render claimants valuable service, and otherwise are competent to assist claimants in presenting claims.

(b) The Administrator, after notice and opportunity for a hearing, may suspend or exclude from further practice before the Veterans' Administration any agent or attorney recognized under this section if he finds that such agent or attorney—

- (1) has engaged in any unlawful, unprofessional, or dishonest practice;
- (2) has been guilty of disreputable conduct;
- (3) is incompetent;

(4) has violated or refused to comply with any of the laws administered by the Veterans' Administration, or with any of the regulations or instructions governing practice before the Veterans' Administration; or

(5) has in any manner deceived, misled, or threatened any actual or prospective claimant.

(c) The Administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits under laws administered by the Veterans' Administration. Such fees—

- [(1) shall be determined and paid as prescribed by the Administrator;
- [(2) shall not exceed \$10 with respect to any one claim; and
- [(3) shall be deducted from monetary benefits claimed and allowed.]

(c) The Administrator, pursuant to regulations which the Administrator shall prescribe, may determine and approve payment of reasonable attorneys' fees to be paid by the claimant, to attorneys recognized under this section, for services rendered in representing an individual before the Veterans' Administration in connection with claims for benefits under laws administered by the Veterans' Administration. In no event shall such attorneys' fee, determined and approved by the Administrator, exceed—

(1) for any claim resolved prior to the claimant's receipt of a statement of the case pursuant to section 4005(d) of this title, \$10 or

(2) for any claim resolved following the claimant's receipt of such statement of the case, an amount in excess of the lesser of—

(A) the fee agreed upon by the claimant and the attorney; or

(B)(i) \$500, or a greater amount specified in regulations prescribed by the Administrator based on changed national economic conditions subsequent to the date of enactment of this subsection, except that the Administrator may, in the Administrator's discretion, determine and approve a fee in excess of \$500 or such greater amount if so specified, in an individual case involving extraordinary circumstances warranting a higher fee; or

(ii) if the claimant and an attorney have entered into an agreement under which no fee is payable to such attorney unless the claim is resolved in a manner favorable to the claimant, 25 per centum of the total amount of any past-due benefits awarded on the basis of the claim.

(d) If, in an action brought under section 4025 of this title, the matter is resolved in a manner favorable to a claimant who was represented by an attorney, the court may determine and approve as part of its judgment a reasonable fee for the representation of such claimant in such action. When the claimant and an attorney have entered into an agreement under which no fee is payable to such attorney unless the matter is resolved in a manner favorable to the claimant, the fee so determined and approved shall not exceed 25 per centum of the total amount of any past due benefits awarded on the basis of the claim. If, in such an action, the matter of not resolved in a manner favorable to a claimant, the court may determine and approve as part of its judgment a reasonable fee, taking into consideration the extent to which there could have appeared to have been a reasonable probability of success for such an action at the time it was filed, for the representation of such claimant not in excess of \$750.

(e) To the extent that past-due benefits are awarded in proceedings before the Administrator or by a court, the Administrator shall direct payment of any attorney's fee that has been determined and approved under this section out of such past-due benefits, but in no event shall the Administrator withhold any portion of benefits payable for a period subsequent to the date of the decision of the Administrator or court making such award.

(f) The determination and approval by the Administrator regarding attorneys' fees pursuant to subsection (e) of this section may be reviewed by a court only to determine whether the Administrator's action constituted an abuse of discretion. Review of the determination and approval by either the Administrator or the court regarding an attorney's fee shall be obtained as follows:

(1) For an award in conjunction with a claim before the Administrator pursuant to subsection (c) of this section, by an action brought, within thirty days after the date of notice of such award, by either the claimant or the attorney in the district court of the United States in the judicial district in which the claimant resides or the claimant's principal place of business is located.

(2) For an award in conjunction with a claim approved by a United States court pursuant to subsection (d) of this section, on a motion made, within thirty days after the date of such award, by either the claimant or the attorney in the district of the United States where the appeal was considered.

For actions brought under clause (1) of this subsection the Administrator shall be named as the defendant, but notice of any such action shall also be given to all parties in interest and all such parties shall be heard by the court reviewing the award.

(g) The provisions of this section shall apply only the cases involving claims for benefits under the laws administered by the Veterans' Administration, and such

provisions shall not apply in cases in which the Veterans' Administration is the plaintiff or in which other attorneys' fees statutes are otherwise controlling.

(h) For the purposes of subsections (c) and (d) of this section, claims shall be considered as resolved in a manner favorable to the claimant when all or any part of the relief sought is granted.

(i) In an action brought under section 4025 of this title, the court, in its discretion, may, as an extraordinary remedy, allow the prevailing party, other than the Administrator, reasonable attorneys' fees as part of the costs.

§ 3405. Penalty for certain acts

Whoever (1) directly or indirectly solicits, contracts for, charges or receives or attempts to solicit, contract for, charge, or receive, any fee or compensation except as provided in section 3404 of 784 of this title, [or] (2) wrongfully withholds from any claimant or beneficiary any part of a benefit or claim allowed and due [him] such claimant or beneficiary, or (3) with intent to defraud, in any manner willfully and knowingly deceives, misleads, or threatens a claimant or beneficiary or prospective claimant or beneficiary under this title with reference to any matter covered by this title, by word, circular, letter, or advertisement, shall be fined not more than \$500 or imprisoned at hard labor for not more than two years, or both

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PART V—BOARDS AND DEPARTMENTS

Chapter	Sec.
71. Board of Veterans' Appeals.....	4001
72. Judicial Review.....	4025
73. Department of Medicine and Surgery	4101
75. Veterans' Canteen Service.....	4201

Chapter 71—BOARD OF VETERANS' APPEALS

Sec.
4001. Composition of Board of Veterans' Appeals.
4002. Assignment of members of Board.
4003. Determinations by the Board.
4004. Jurisdiction of the Board.
4005. Filing of notice of disagreement and appeal.
4005A. Simultaneously contested claims.
4006. Administrative appeals.
4007. Docketing of appeals.
4008. Rejection of applications.
4009. Independent medical opinions.
4010. Adjudication procedures.
4011. Notice of procedural rights.

§ 4001. Composition of Board of Veterans' Appeals

(a) There shall be in the Veterans' Administration a Board of Veterans' Appeals (hereinafter in this chapter referred to as the "Board") under the administrative control and supervision of a chairman directly responsible to the Administrator. The Board shall consist of a Chairman, a Vice Chairman, such number (not more than [fifty] sixty five) or [associate] members as may be found necessary, and such other professional, administrative, clerical, and stenographic personnel as are necessary in conducting hearings and considering and disposing of appeals properly before the Board in a timely manner.

(b) Members of the Board (including the Chairman and Vice Chairman) shall be appointed by the Administrator with the approval of the President.

(c) The Chairman shall submit a report to the appropriate committees of the Congress, not later than February 1, 1980, and annually thereafter, on the experience of the Board during the prior fiscal year together with projections for the fiscal year in which the report is submitted and the subsequent fiscal year. Such report shall contain, as a minimum, the number of cases appealed to the Board during the prior fiscal year, the numbers of cases pending before the Board at the beginning and end of such fiscal year, the number of such cases which were filed during each of the twenty-four months preceding the prior fiscal year and the then current fiscal year, respectively, the average length of time a case was before the Board between the time of filing of an appeal and the disposition during the prior fiscal year, and the number of members and other professional, administrative, clerical, stenographic, and other personnel employed by the Board at the end of the prior fiscal year. The

projections for the current fiscal year and subsequent fiscal year shall include, for each such year, estimates of the number of cases to be appealed to the Board and an evaluation of the Board's ability, based on existing and projected personnel levels, to ensure timely disposition of such appeals as required by subsection (a) of this section.

§ 4002. Assignment of members of Board

The Chairman may from time to time divide the board into sections of three members, assign the members of the Board thereto, and designate the chief thereof. If a section as a result of a vacancy or absence or inability of a member assigned thereto to serve thereon is composed of a number of members less than designated for the section, the Chairman may assign other members to the section or direct the section to proceed with the transaction of business without awaiting any additional assignment of members thereto. A hearing docket shall be maintained and formal recorded hearings shall be held by such [associate] member or members as the Chairman may designate, the [associate] member or members being of the section which will make final determination in the claim. A section of the Board shall make a determination on any proceeding instituted before the Board and on any motion in connection therewith assigned to such section by the Chairman and shall make a report of any such determination, which report shall constitute its final disposition of the proceeding.

§ 4003. Determinations by the Board

(a) The determination of the section, when unanimously concurred in by the members of the section shall be the final determination of the Board, except that the Board on its own motion may correct an obvious error in the record, or may upon the basis of additional official information from the service department concerned, *after notice to the claimant of such additional information together with an opportunity to be heard in connection with such information*, reach a contrary conclusion.

(b) When there is a disagreement among the members of the section the concurrence of the Chairman with the majority of members of such section shall constitute the final determination of the Board, except that the Board on its own motion may correct an obvious error in the record, or may upon the basis of additional official information from the service department concerned, *after notice to the claimant of such additional information together with an opportunity to be heard in connection with such information*, reach a contrary conclusion.

§ 4004. Jurisdiction of the Board

(a) All questions on claims involving benefits under the laws administered by the Veterans' Administration shall be subject to one review on appeal to the Administrator. Final decisions on such appeals shall be made by the Board *after affording the claimant an opportunity for a hearing and shall be based exclusively on evidence and material of record in the proceeding and on applicable provisions of law.*

(b) When a claim is disallowed by the Board, it may not thereafter be reopened and allowed, and no claim based upon the same factual basis shall be considered; however, where subsequent to disallowance of a claim, new and material evidence [in the form of official reports from the proper service department] is secured, the Board may authorize the reopening of the claim and review of the former decision. *A judicial decision upholding, in whole or in part, the disallowance of a claim under chapter 72 of this title shall not diminish the Board's discretionary authority under this subsection to reopen the claim and review the Board's former decision.*

(c) The Board shall be bound in its decisions by the regulations of the Veterans' Administration, instructions of the Administrator, and the precedent opinions of the chief law officer.

[(d) The decisions of the Board shall be in writing and shall contain findings of fact and conclusions of law separately stated.]

(d) *After reaching a decision in each case, the Board shall promptly mail notice of its decision to the claimant and the claimant's authorized representative, if any, at the last known address of the claimant and at the last known address of the claimant's authorized representative, if any. Each decision of the Board shall include—*

(1) a written statement of the Board's findings and conclusions, and reasons or bases therefor, on all material issues of fact, law, and matters of discretion presented on the record; and

(2) an order granting appropriate relief or denying relief.

§ 4005. Filing of notice of disagreement and appeal

(a) * * *

(5) The Board of Veterans' Appeals [will base its decision on the entire record and] may dismiss any appeal which fails to allege specific error of fact or law in the determination being appealed.

§ 4009. Independent medical opinions

(a) When, in the judgment of the Board, expert medical opinion, in addition to that available within the Veterans' Administration, is warranted by the medical complexity or controversy involved in an appeal case, the Board is authorized to secure an advisory medical opinion from one or more independent medical experts who are not employees of the Veterans' Administration.

(b) The Administrator shall make necessary arrangements with recognized medical schools, universities, or clinics to furnish such advisory medical opinions at the request of the Chairman of the Board. Such arrangement will provide that the actual selection of the expert or experts to give the advisory opinion in any individual case will be made by an appropriate official of such institution.

(c) Whenever there exists in the evidence of record in an appeal case a substantial disagreement between the substantial findings or opinions of two physicians with respect to an issue material to the outcome of the case, the Board shall, upon the request of the claimant and, after taking appropriate action to attempt to resolve the disagreement, arrange for an advisory medical opinion in accordance with the procedure prescribed in subsection (b) of this section. If the Board denies the request of such claimant and the claimant's authorized representative, if any, a statement setting forth the basis for its determination. Actions of the Board under this subsection, including any such denial, shall be final and conclusive and no other official or any court of the United States shall have the power or jurisdiction to review any aspect of any such decision by an action in the nature of mandamus or otherwise, chapter 72 of this title to the contrary notwithstanding.

§ 4010. Adjudication procedures

(a) For purposes of conducting any hearing, investigation, or other proceedings in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, the Administrator may administer oaths and affirmations, examine witnesses, and receive evidence.

(b) Any oral, documentary, or other evidence, even though inadmissible under the rules of evidence applicable to judicial proceedings, may be admitted in a hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, but the Administrator, under regulations of the Administrator, may provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

(c) In the course of any proceeding before the Board, any party to such proceeding or such party's authorized representatives shall be afforded opportunity—

(1) at a reasonable time prior thereto as well as during such proceeding, to examine and, on payment of a fee prescribed pursuant to section 3302(b) of this title (not to exceed the direct cost of duplication), obtain copies of the contents of the case files and all documents and records to be used by the Veterans' Administration at such proceeding;

(2) to present witnesses and evidence, subject only to such restrictions as may be set forth in regulations of the Administrator, pursuant to subsection (b) of this section, as to materiality, relevance, and undue repetition;

(3) to make oral argument and submit written contentions, in the form of a brief or similar document, on substantive and procedural issues;

(4) to submit rebuttal evidence;

(5) to present medical opinions and request an independent advisory medical opinion pursuant to section 4009(c) of this title; and

(6) to serve written interrogatories on any person, including employees of the Veterans' Administration, which interrogatories shall be answered separately and fully in writing and under oath unless written objection thereto, in whole or in part, is filed with the Administrator by the person to whom the interrogatories are directed or such person's representative.

The fee provided for in clause (1) of this subsection may be waived by the Administrator, pursuant to regulations which the Administrator shall prescribe, on account of the party's inability to pay or for other good cause shown. In the event of any objection, filed under clause (6) of this subsection, the Administrator shall, pursuant

to regulations which the Administrator shall prescribe establishing standards consistent with standards for protective orders under rule 26(c) of the Rules of Civil Procedure for the United States District Courts, evaluate such objection and issue an order (A) directing that, within such period as the Administrator shall specify, the interrogatory or interrogatories objected to be answered as served or answered after modification, or (B) indicating that the interrogatory or interrogatories are no longer required to be answered. If any person upon whom interrogatories are served under this section fails to answer or fails to provide responsive answers to any such interrogatories within thirty days after service or such additional time as the Administrator may allow, the Administrator shall, upon a statement or showing by the party who served such interrogatories of general relevance and reasonable scope of the evidence sought, issue a subpoena pursuant to section 3311 of this title (with enforcement of such subpoena to be available pursuant to section 3313 of this title) for such person's appearance and testimony on such interrogatories at a deposition on written questions, at a location within one hundred miles of where such person resides, is employed, or transacts business.

(d) In the course of any hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, an employee of the Veterans' Administration may at any time disqualify himself or herself, on the basis of personal bias or other cause, from adjudicating the claim. On the filing by a party in good faith of a timely and sufficient affidavit averring personal bias or other cause for disqualification on the part of such an employee, the Administrator shall determine the matter as a part of the record and decision in the case.

(e) The transcript or recording of testimony and the exhibits, together with all papers and requests filed in the proceeding, and the decision of the Board shall constitute the exclusive record for decision in accordance with section 4004(a) of this title, and shall be available for inspection by any party to such proceeding, or such party's authorized representative, at reasonable times and places and, on the payment of a fee prescribed pursuant to section 3302(b) of this title (not to exceed the direct cost of duplication), shall be copied for the claimant or such claimant's authorized representative within a reasonable time. Such fee may be waived by the Administrator, pursuant to regulations which the Administrator shall prescribe, on account of the party's inability to pay or for other good cause shown.

(f) Notwithstanding section 4004(a) of this title, section 554(a) of title 5, or any other provision of law, adjudication and hearing procedures prescribed in this title and in regulations prescribed by the Administrator under this title for the purpose of administering veterans' benefits shall be exclusive with respect to hearings, investigations, and other proceedings in connection with the consideration of claim for benefits under laws administered by the Veterans' Administration.

§ 4011. Notice of procedural rights

In the case of any denial, in whole or in part, of a claim for benefits under laws administered by the Veterans' Administration, the Administrator shall, at each procedural stage relating to the disposition of such a claim, beginning with denial after an initial review or determination and including the furnishing of a statement of the case and the making of a final determination by the Board, provide to the claimant and such claimant's authorized representative, if any, written notice of the procedural rights of the claimant. Such notices shall be on such forms as the Administrator shall prescribe by regulation and shall include, in easily understandable language, with respect to proceedings before the Veterans' Administration, (1) descriptions of all subsequent procedural stages provided for by statute, regulation, or Veterans' Administration policy, (2) descriptions of all rights of the claimant expressly provided for in or pursuant to this chapter, of the claimant's rights to a hearing, to reconsideration, to appeal, and to representation, and of any specific procedures necessary to obtain the various forms for review available for consideration of the claim, and (3) such other information as the Administrator, as a matter of discretion, determines would be useful and practical to assist the claimant in obtaining full consideration of the claim.

Chapter 73—JUDICIAL REVIEW

Sec.

4025. Jurisdiction.

4026. Scope of review.

4027. Remands.

4028. Survival of actions.

4029. Appellate review.

§ 4025. Jurisdiction

(a) Except as provided in subsection (h) of this section, after any final decision of the Administrator (as defined in subsection (c) of this section) adverse to a claimant in a matter involving a claim for benefits under any law administered by the Veterans' Administration, such claimant may obtain a review of such decision in a civil action commenced within 180 days after the mailing to the claimant of notice of such decision pursuant to section 4004 of this title. Such action shall be brought against the Administrator in the district court of the United States for the judicial district in which the plaintiff resides or the plaintiff's principal place of business is located, or in the district court of the United States for the judicial district where the principal offices of the Board of Veterans' Appeals (established under section 4001 of this title) are located.

(b) In any matter not directly involving a claim for benefits under any law administered by the Veterans' Administration, section 211(a) of this title shall not operate as a bar to a civil action otherwise authorized by law.

(c) For the purposes of this chapter, "final decision of the Administrator" means—

(1) a final determination of the Board of Veterans' Appeals pursuant to section 4004(a) or (b) of this title; or

(2) a dismissal of an appeal by the Board of Veterans' Appeals pursuant to section 4005 or 4008 of this title.

(d) The provisions of this chapter shall not apply to matters arising under chapters 19 and 37 of this title.

(e) The complainant initiating an action under subsection (a) of this section shall contain sufficient information to permit the Administrator to identify and locate the plaintiff's Veterans' Administration records.

(f) Administrator shall file, together with the answer to a complaint filed pursuant to subsection (a) of this section, a certified copy of the records upon which the findings of fact and decision complained of are based or, if the Administrator determines that the cost of filing copies of all such records is unduly expensive, the Administrator shall file a complete index of all documents, transcripts, or other materials comprising such records. After such index is filed and after considering requests from all parties, the court shall require the Administrator to file certified copies of such indexed items as the court deems relevant to the consideration of the case.

(g) In action brought pursuant to subsection (a) of this section, the court shall have the power, upon the pleadings and the records specified in subsection (f) of this section, to enter judgment in accordance with section 4026 of this title or remand the cause in accordance with section 4026 or 4027 of the title.

(h) No action may be brought under this section as to which the initial claim for benefits is filed pursuant to section 3001(a) of this title after the last day of the fifth fiscal year beginning after the effective date of this section.

§ 4026. Scope of review

(a) In any action brought under section 4025 of this title, the reviewing court to the extent necessary to its decision and when presented, shall—

(1) decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions;

(2) compel action of the Administrator unlawfully withheld; and

(3) hold unlawful and set aside decisions, findings, and conclusions of the Administrator found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations; or in violation of a statutory right; or

(D) without observance of procedure required by law.

If the reviewing court finds the Administrator's finding on an issue or issues of fact to be arbitrary, capricious, or an abuse of discretion, the court shall specify where it finds the record to be deficient and shall, prior to entering any judgment reversing such decision, remand the case a single time to the Administrator for further action not inconsistent with the court's order. In so remanding, the court shall specify a reasonable period within which the Administrator shall complete the required action and, if such action is not completed within the time specified by the court, the matter shall be returned to the court for its action.

(b) In making the determinations under subsection (a) of this section, the court shall review the whole record before the court pursuant to section 4025(f) of this title or those parts of such record cited by a party, and due account shall be taken of the rule of prejudicial error.

(c) In no event shall findings of fact made by the Administrator be subject to trial de novo by the reviewing court.

(d) When a final decision of the Administrator (as defined in section 4025(c) of this title) is rendered in any case and such decision is adverse to a party solely because of the failure of such party to comply with any applicable regulation of the Veterans' Administration, the court shall review only questions raised as to compliance with and the validity of the regulation.

§ 4027. Remands

In any action brought under section 4025 of this title, the reviewing court shall, on motion of the Administrator made before the expiration of the time specified for the filing of an answer for a complaint filed pursuant to subsection (a) of such section, allow a single remand of a case to the Administrator for further review by the Administrator. If such review is not completed within ninety days after the date of such remand, the matter shall be returned to the court for its action. At any time after the Administrator files an answer, the court may, in the exercise of its discretion, remand the case to the Administrator for further action by the Administrator and, if either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there is good cause for granting such leave, the court shall remand the case to the Administrator and order such additional evidence to be taken by the Administrator; in either case, the court may specify a reasonable period of time within which the Administrator shall complete the required action. After a case is remanded to the Administrator, and after further action by the Administrator, including consideration of any additional evidence, the Administrator shall modify, supplement, or affirm the findings of fact or decision, or both, and shall file with the court any such modification, supplementation, or affirmation of findings of fact or decision or both, as the case may be, and certified copies of any additional records and evidence upon which such modification, supplementation, or affirmation was based. Any such modification, supplementation, or affirmation of the findings of fact or decision shall be reviewable by the court only to the extent provided in section 4026 of this title with respect to the review of the original findings of fact and decision.

§ 4028. Survival of actions

Any action brought under section 4025 of this title shall survive, notwithstanding any change in the person occupying the Office of the Administrator or, any vacancy in such office.

§ 4029. Appellate review

The decisions of a district court pursuant to this chapter shall be subject to appellate review by the courts of appeals and the Supreme Court of the United States in the same manner as judgments in other civil actions.

* * * * *

[No. 36A]

COMMITTEE ON VETERANS' AFFAIRS, U.S. SENATE

Office of the
Administrator
of Veterans Affairs

Washington, D.C. 20420



Veterans
Administration

JULY 14 1981



Honorable Alan K. Simpson
Chairman, Committee on
Veterans' Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

We are pleased to respond to your request for a report on S. 349, 97th Congress, entitled the "Veterans' Administration Adjudication Procedure and Judicial Review Act."

This measure is identical to S. 330, 96th Congress, which passed the Senate on September 17, 1979, and was not acted upon by the House of Representatives. The bill contemplates four major changes in present law concerning claims involving benefits administered by the Veterans Administration. First, the bill would codify, with some changes, the internal adjudication procedures now used by the Agency in making benefit decisions. Second, it would statutorily subject VA rulemaking to the provisions of the Administrative Procedure Act at 5 U.S.C. § 553. Third, the bill would provide access to the courts to claimants who are dissatisfied with VA benefit decisions, and eliminate the operation of 38 U.S.C. § 211(a) as a bar to any civil action otherwise authorized by law. Finally, this legislation would substantially revise the current \$10 statutory limitation on the fee an attorney may receive for representing an individual claimant in prosecuting a claim for veterans' benefits.

Before discussing the various provisions of S. 349, we would like to briefly review the VA's position on the issues it addresses. Many of these issues were discussed during the hearings held by this Committee in the last Congress on S. 330, and in the 95th Congress on S. 364. Such a review may prove helpful, since the Agency's current position on judicial review and related issues differs from that previously expressed with regard to S. 330.

Historically, the Agency has been in agreement with the longstanding congressional policy to preclude judicial review of the decisions of the Administrator. However, on October 7, 1977, in our report to this Committee on S. 364, we suggested that the finality statute, 38 U.S.C. § 211(a), should be amended to provide veterans with access

(1)

to the Federal courts to resolve any constitutional questions arising from the administration of VA programs. Moreover, we stated that, if Congress deemed it appropriate, we no longer opposed limited judicial review of individual benefit decisions not involving constitutional questions. This neutral position was again expressed in conjunction with S. 330, on which we reported to the Committee on March 21, 1979.

In addition, although we believed then, as we do now, that our current adjudication procedures meet all of the requirements of fundamental fairness and comport with the evolving concept of "due process," we previously suggested that if Congress believes additional procedural requirements at the administrative level are desirable, they should be clearly specified in title 38, and predicated upon conformity with the unique nature and realities of VA functions and procedures. Finally, we stated that we would not object to a modification of the present attorney fee limitation, provided the best interests of veterans and other claimants are protected.

The present bill, as did S. 330, addresses many of the complex issues involved in these areas. Our report discusses these issues, identifies problems we perceive in S. 349, and articulates our modified position on judicial review.

As mentioned above, we have reassessed the desirability and efficacy of the proposed legislation on judicial review of VA benefit decisions. This reevaluation has been undertaken with the goal of assuring, on the one hand, that veterans, their dependents, and their survivors receive constitutional due process protections equivalent to those rights available to other Americans; and, on the other hand, that the administration of veterans' benefits is not overly burdensome upon either our claimants or the Government. In the context of the economic program of the present Administration, we believe that any proposed legislation which would generate additional expenditures of Government funds, particularly in increasing the staff of the VA and the administrative burden upon the Agency, should be examined with great circumspection. A further concern, of course, is the cost impact upon the Department of Justice and the Federal courts which would result from judicial review legislation. Only if there is demonstrated a clear need which justifies the new expense, will we support such new legislation.

Our position on S. 349 is one of opposition. It is our considered opinion that, on balance, the informal, non-adversary nature of our claim procedures, combined with our willingness to assist in developing evidence, to provide a personal hearing at virtually any stage of the adjudication process, and to resolve any reasonable doubt in favor of granting benefits, affords our claimants at least a parity of due process with all other citizens. Moreover, the right to appeal and obtain a de novo review by the Board of Veterans Appeals, without the significant costs of litigation, endows a VA claimant with a practical and effective brand of due process which is far less onerous than judicial review would be. Accordingly, we conclude that legislation such as S. 349, providing for court review of individual benefit determinations, is neither necessary nor advisable.

We continue to believe that there should be access to the courts for challenges to the constitutionality of veterans' benefits legislation, regulations, and procedures. This notion logically flows from a 1974 decision of the U.S. Supreme Court which held that 38 U.S.C. § 211(a) does not preclude judicial inquiry into whether a statute establishing a veterans' benefit program is constitutional. Clearly, determinations as to constitutionality and statutory interpretation are uniquely within the power and expertise of the judiciary. In addition, we are cognizant of an emerging trend in several Federal district courts and courts of appeals toward permitting judicial review of allegations that a regulation was promulgated in excess of the Administrator's authority or is otherwise contrary to law. This growing body of case law would seem to provide a sufficient basis for review of substantive agency actions of broad, binding application, without the need for new legislation.

As for judicial review of individual benefit decisions, our continuing study of the issue leads us to oppose modification of the present law. The courts have consistently maintained the validity of 38 U.S.C. § 211(a) in its present form, declining to review the technical and complex fact-specific decisions of the VA on individual claims. Moreover, we do not believe the record reveals deficiencies in VA's present handling of individual benefit decisions such as would warrant the imposition of judicial review of such decisions, or the enactment of the other sweeping changes proposed in S. 349. Because of the problems which we perceive in the bill, as well as the costs which would result, we cannot support its enactment.

In considering the provisions of S. 349, we believe that a brief review of the history of the finality statute, 38 U.S.C. § 211(a), together with an explanation of current VA claims procedures, will be helpful in understanding the issues raised by the proposed legislation. A more detailed discussion of the legislative history and judicial construction of the present finality and attorney fee statutes, as well as a thorough description of our claim procedures, may be found in the three Attachments to this report.

Judicial Review of Administrator's Decisions

The legislative history and the judicial construction of subsection 211(a) of title 38, United States Code, reflect a continued, longstanding intent by Congress to maintain the finality of decisions of the Administrator of Veterans Affairs. Subsection 211(a), as amended in 1970, provides:

On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

The constitutionality of that provision has been upheld over the years, based in part on the theory that Congress may provide an exclusive administrative remedy when it creates rights in individuals against the Government. However, recent court decisions have qualified the sweeping immunity from court review provided in subsection 211(a) by assuming jurisdiction, not only of challenges to the constitutionality of statutes, regulations, and procedures governing Veterans Administration benefits, but also of challenges to the Administrator's authority to promulgate regulations.

The most significant of these cases is Johnson v. Robison, 415 U.S. 361 (1974). In Robison, the Supreme Court declared that subsection 211(a) does not preclude court review of challenges to the constitutionality of veterans' benefits legislation. On the merits, the Court upheld the constitutionality of a statute denying veterans' educational benefits to conscientious objectors who had not served in the military but had instead performed alternative service.

The rationale of the Robison holding was extended in Plato v. Roudebush, 397 F. Supp. 1295 (D. Md. 1975), to permit review of VA hearing procedures. The court held that the VA's failure to provide a pension recipient an opportunity for a pretermination hearing was a denial of plaintiff's due process rights and that subsection 211(a) does not preclude court review of the constitutionality of VA procedures. This case has been relied on as a basis for jurisdiction in a number of subsequent suits questioning the constitutionality of agency procedures.

Further development following Robison has taken place in a series of cases in which both institutions and individuals have sued to challenge the validity of VA regulations. In each case a Federal appellate court held that, notwithstanding the language of subsection 211(a), questions of the statutory authority underlying the promulgation of regulations are judicially cognizable. The leading example is Wayne State University v. Cleland, 590 F.2d 627 (6th Cir. 1978), in which regulations governing the veterans' educational assistance program were attacked as being in excess of statutory authority. The court considered the merits of the regulations and ruled in favor of the Government, holding the regulations to be valid. More recently, a female veteran has successfully challenged a regulation barring VA hospital care benefits for routine pregnancy and childbirth. Kirkhuff v. Cleland, No. 79-2310 (D.D.C. May 8, 1981).

It must be kept in mind that Robison and its progeny have all involved statutes, regulations, or procedures, i.e., congressional or agency decisions and practices of universal, binding application. We point this out in order to stress the continued vitality of subsection 211(a) in shielding the Administrator's decisions on individual, fact-specific cases from judicial review.

A recent case applying this vital distinction was Carter v. Cleland, 643 F.2d 1 (D.C. Cir. 1980), in which the plaintiff sought court review of the VA's determination, affirmed by the Board of Veterans Appeals, that she was not entitled to receive a survivor's pension. Attempting to circumvent the finality statute, the plaintiff characterized her lawsuit as a challenge to VA regulatory action, although no regulation was actually involved; plaintiff alleged that an internal administrative guideline, interpreting existing statutory and regulatory requirements determining her eligibility for benefits, was invalid as being in excess of the Administrator's statutory authority. The court recognized that the plaintiff was actually seeking review of the Administrator's final decision on the application of the particular facts of her claim to the pertinent laws and regulations, and concluded that subsection 211(a) barred such review.

Current Adjudication Procedures

Current Veterans Administration claims procedures are designed to assure the claimant due process and to prevent any possible abuse of discretion by the Administrator. These procedures are defined by statutes and regulations which charge the VA with the duty to assist the claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law, 38 C.F.R. § 3.103(a). Further, if the evidence presented raises a reasonable doubt regarding service origin, degree of disability, or any other point, VA regulations provide that such doubt is to be resolved in favor of the claimant. 38 C.F.R. § 3.102.

The most salient characteristic of the VA claim process is its informality. In most cases, a claimant may submit an application without need of any assistance, and without an attorney. If a claimant desires assistance, or needs advice, access is provided to VA employees who specialize in answering inquiries and assisting in the development and submission of claims. At the same level, there exists a wide network of veterans' service organizations which furnish technically proficient claims specialists at no charge to assist claimants in the presentation of their claims.

In almost all cases, a claimant need do nothing more than file a claim on a proper application form. Generally, the Agency will procure all of the evidence necessary to establish the claimant's eligibility for the benefits sought. Where the evidence is insufficient to grant the benefit, the claimant is advised what evidence is required and what sources are acceptable.

Any decision with which a claimant disagrees may be appealed within the Agency by merely filing a Notice of Disagreement. This will initiate a review of the claim and, if it remains denied, the preparation of a Statement of the Case. A Statement of the Case sets forth the facts and law relied upon to reach the unfavorable decision and the reasons therefor, and is designed to assist the claimant in preparing the best arguments possible to support the claim on appeal. If, after receiving the Statement of the Case, a claimant remains dissatisfied with the decision, the appeal will be heard by the Board of Veterans Appeals. The Board's decision, made after a complete and independent review of all of the evidence of record, is final.

Hearings are available at almost any point in the claims process, both at the initial level of adjudication and at the appellate stage. Such hearings are conducted informally, and, although the Agency attempts to provide all possible assistance, a claimant may be represented by an attorney or one of the service organizations' claim specialists.

The foregoing procedures have evolved over the years and in general have functioned well by providing maximum services to the veterans of all eras. In addition, we believe that they meet all of the requirements of fundamental fairness and compare favorably with the procedures of other Government agencies administering benefit programs. Finally, we believe that our procedures continue to comply with the evolving concept of "due process." This is one of the reasons we believe legislation such as that proposed in S. 349 is unnecessary.

In our reports to this Committee on S. 364, 95th Congress, and S. 330, 96th Congress, we stated that to the extent Congress concludes that changes in our procedures are desirable, they should be effected by amending title 38 rather than merely subjecting the VA to the general constraints of chapter 5 of the Administrative Procedure Act.

We suggested that this would provide an opportunity for a more precise specification of any such changes, tailored to VA's unique functions and procedures. We further suggested that if Congress deems it advisable to formalize our procedures, such formalization should occur at the appellate level rather than at the initial claim level.

Title I--Adjudication Procedures

It is apparent from the substance of the changes contemplated by title I of this bill that the proposal does not take issue with our basic position that VA procedures function fairly and efficiently in the overwhelming majority of cases. In fact, many of the provisions of title I would merely have the effect of codifying our present adjudication procedures with little or no substantial change.

In this connection, we do not believe that codification of the "benefit of the doubt" standard in section 101 of the bill would require a significant departure from our current policy. As noted above, we have for some years followed a policy, articulated in our regulations at 38 C.F.R. § 3.102, of resolving any reasonable doubt in favor of the claimant. This doctrine applies where a reasonable doubt arises concerning service origin, degree of disability, or any other point. S. 330, 96th Congress, provided for statutory codification of our policy for two reasons: first, to allay the concern of several commentators that, once subject to judicial review, VA might abandon the rule lest reviewing courts overextend its scope and grant benefits in undeserving cases; and, second, to clarify the standard as stated in the regulation, so as to remove what the Committee report on S. 330 called "sometimes internally inconsistent terms." Aside from these theoretical concerns, we know of no evidence or allegation that the present reasonable doubt standard, as applied, is inadequate.

We observe that the term "benefit of the doubt" has been used instead of "reasonable doubt" in response to our previous recommendation, to avoid confusion with the more familiar usage of the latter term in criminal law. We further note that the provision concerning burden of proof in the proposed new subsection 3007(a) is, in essence, a restatement of our current regulatory requirement. Accordingly, enactment of this section of S. 349 would not alter our present pro-claimant orientation. Nevertheless, consistent with our current position opposing judicial review of

the factual findings in benefit decisions, we now believe it would be preferable to forebear such legislation and permit the present, longstanding agency policy to continue in effect.

The provisions of section 105 of S. 349 amending 38 U.S.C. § 4003 to require notice and an opportunity for a hearing, and in section 106 amending 38 U.S.C. § 4004 to require an opportunity for a hearing prior to a Board of Veterans Appeals (BVA) decision on a claim for benefits do not differ from our current practices in these areas. The removal of the statutory limitation, at 38 U.S.C. § 4004(b), that new and material evidence sufficient to permit the BVA to reopen an otherwise final decision must be in the form of official reports from the proper service department, also comports with the Board's present practice. In line with our liberal policy of assisting claimants to receive every benefit to which they are entitled, the Board reopens a prior decision upon the receipt of new and material evidence in any form. For the most part, the present practices of the BVA are already in compliance with those provisions of S. 349 requiring the Board to promptly send the claimant and his representative notice of its decision, as well as those specifying what information is to be included in a BVA decision.

S. 349 would also restate or codify many of our current hearing procedures. New section 4010 of title 38, in section 109 of the bill, would authorize the Administrator, in the course of any hearing, investigation or other proceeding, to administer oaths and affirmations, examine witnesses, and receive evidence. This provision closely parallels similar authority now granted to the Administrator in 38 U.S.C. § 3311. This new section also would permit the Administrator to receive either oral or documentary evidence even though such evidence may be inadmissible in a court of law. The Administrator would be permitted to exclude irrelevant, immaterial, or unduly repetitious evidence. This provision clearly indicates that the evidence submitted at a hearing need not conform to the formal rules of evidence, and at the same time provides the Agency with the means to exert some degree of control over the submission of evidence in a manner not inconsistent with the VA's existing liberal policies.

New section 4010 would also codify many of the hearing rights now granted to a claimant, such as the opportunity to examine and obtain copies of his or her VA records, to present witnesses and evidence, to make oral arguments, to submit written contentions and rebuttal evidence, and

to present medical opinions. While the language of the provision concerning disqualification of a VA employee in the course of a hearing, investigation, or other proceeding because of bias would require a more formal procedure to raise this issue than is now required, it does not appear likely to prove overly burdensome to a claimant. We would note, however, that provision for disqualification of BVA members already exists, at 38 C.F.R. § 19.147. Thus, although the language of section 4010 is adopted from the hearing provisions of both the Social Security Administration, 42 U.S.C. § 405(b), and the Administrative Procedure Act, 5 U.S.C. § 556, it would permit the retention of many practices now in use in the VA without substantial change.

With respect to the new section 4011 of title 38, also to be added by section 109 of S. 349, dealing with notice of procedural rights, we note that our current procedures substantially comply with the proposed provision. We would only add that the final provision of this section, requiring the Administrator to include in the notices "such other information as the Administrator, as a matter of discretion, determines would be useful and practical to assist the claimant in obtaining full consideration of the claim" is a generally meaningless and therefore unnecessary addition to this section.

As explained above, many of the procedures which would be required by title I of S. 349 are already being followed and would have little or no additional impact on the adjudication of veterans' benefit claims. However, there are several provisions in title I which would require substantial changes to our current procedures.

The most obvious change in VA claim procedures would result from section 110 of the bill, which would mandate a two-pronged study, lasting two to three years, to test alternative methods aimed at resolving benefit claims faster and at more convenient locations for claimants. Section 110(b)(2), calling for at least quarterly visits by a panel or panels of the BVA to three geographic areas to conduct appeal hearings, would increase the frequency of BVA visits to the selected regional offices, and would have significant impact upon BVA staffing, travel expenses, and workload. Section 110(b)(1), moreover, would require the provision of an additional tier of adjudication at the regional office level in at least three geographic areas; in effect, the

claimant could request a second consideration of the claim, by a new adjudication panel, at the agency of original jurisdiction, be afforded a hearing, and receive a second Statement of the Case, all while retaining the right to appeal to the BVA.

This pilot project conducted pursuant to section 110 would, in our view, add an unnecessary delay to consideration of claims at the selected regional offices. We can understand the inclination of the drafters to believe that a "second look" may result in allowance of a claim at the regional office level, thus obviating the need for appeal to the distant BVA. Nevertheless, besides the fact that there are at least fifteen regional offices which currently lack sufficient numbers of adjudicative personnel to provide a second panel which is unfamiliar with a case, we are of the opinion that adding one more layer of review would not be of significant value to either the Agency or the claimant. There simply has to be a limit to the number of times a case is evaluated. At present, a claim, once initially denied, is reconsidered upon the filing of a Notice of Disagreement, prior to the preparation of a Statement of the Case, and is again reconsidered, de novo, by the BVA after an appeal is filed.

In view of the foregoing, we seriously question the utility of the aspect of the study which would mandate a trial program of additional adjudication. As for the enhanced schedule of BVA regional office visits, our principal reservation concerns the drain on the Board's resources resulting from the increased travel involved.

The use of written interrogatories in the adjudication of VA benefit claims is another change contemplated in S. 349, to be codified at new subsection 4010(c) of title 38. This provision is apparently intended to complement the overall judicial review scheme by furnishing a tool for use by the claimant in gathering evidence. We find the provision objectionable because it would inject an adversarial tone into the decision-making process unnecessarily, in light of the already existing authority which the Administrator has, under 38 U.S.C. § 3311, to issue subpoenas and otherwise compel the production of evidence on a claimant's behalf.

Section 108 of the bill provides a change which could have an impact upon the BVA. It would establish a standard by which the Board would evaluate requests by claimants or their representatives for advisory medical opinions, and require the Board, where it declines to seek such an opinion, to provide a statement as to the basis for that decision. Under the codified standard, the Board would be obligated to obtain an advisory medical opinion, upon request, whenever a case presents "a substantial disagreement between the substantiated findings or opinions of two physicians with respect to an issue material to the outcome of the case," and the Board has taken "appropriate action to attempt to resolve the disagreement." At present, the BVA obtains such opinions, under 38 U.S.C. § 4009, either on its own initiative or at the request of a claimant or representative, where the Board believes the dispositive medical issue is so complex or controversial as to warrant an outside review. Seventy-three medical schools now participate in the Independent Medical Expert (IME) program, in which cases are referred to the schools for evaluation of the record by medical specialists designated by the schools.

Any estimate of the number of requests for an independent medical opinion that would actually be made under this provision can only be a matter of speculation. Currently, the BVA obtains about 200 IME opinions annually, mostly in cases where the issue is whether a disability is service-connected. This figure may be expected to rise proportionately with the Board's caseload, but whether the new standard would generate additional requests for opinions is problematical. We presume no conscientious representative wishes to risk criticism for failure to take advantage of all the resources available in the effort to obtain the benefits claimed. In addition, there could be various interpretations of the term "substantiated findings or opinions." We believe it should be read to mean complaints, symptoms, and manifestations of a disease or pathologic state corroborated by physical findings on examination and appropriate laboratory tests.

We believe the bill properly provides that the Board's decision to forego an IME opinion would not be judicially reviewable. Such provision could prevent abuse of the IME program and forestall an unwarranted expansion of the program to an extent which might overtax the limited number of medical schools available to participate in it.

We do believe that, in some cases, the increased use of IME opinions could be a valuable tool in establishing a claimant's entitlement to VA benefits. As an alternative to a statutory provision in this area, we suggest that a more effective method to expand the IME program would be through regulations prescribed by the Administrator after any problems in the current program susceptible to correction by expanded use of independent medical opinions are identified.

In summary, we note that many of the procedures required by title I of S. 349 would have little or no additional impact upon the adjudication of veterans' benefit claims, since VA's current claim procedures essentially comply with the goals underlying the proposals. Obviously, however, much of title I is intended to be enacted to complement the changes contemplated by title III, i.e., judicial review of VA claim decisions. Accordingly, our opposition to title III, discussed infra, compels us to point out that title I of the bill would create burdens upon the Agency incommensurate with the benefits it would offer to claimants, and its provisions should not separately be enacted.

Title II--Veterans Administration Rule Making

Title II of the bill would require the VA to comply with the public notice and comment provisions of section 553 of title 5, the "informal" rulemaking provision of the Administrative Procedure Act (APA). With respect to this provision, it should be observed that the Agency has voluntarily been in substantial compliance with the requirements of section 553 since April 1972. At that time, a regulation, 38 C.F.R. § 1.12, was promulgated which requires notice of regulatory changes to be published in the Federal Register in accordance with the provisions of the APA. This regulation is binding on all elements of the VA.

Therefore, it is our current practice to publish proposed regulations in the Federal Register in advance of their effective date, offer the public opportunity for comment, and publish our final version of the regulation with a summary of the comments received and the reasons they were or were not accepted. In view of our voluntary compliance, we have no serious objection to this provision.

As a technical matter, we note that section 201 of the bill would specifically preclude our reliance on subsection (a)(2) of section 553, which allows an agency to forego public notice and comment for regulations dealing with "loans, grants, [or] benefits," the so called "proprietary exemption." It would not prevent VA's reliance on subsection (b) of section 553, which provides further exceptions. This dichotomy comports with our current regulation, so that the Agency could continue to issue some regulations without a public comment period when, for example, public notice and comment would be "impracticable, unnecessary, or contrary to the public interest." As we do now, we would publish a brief statement justifying the exception relied upon in our Federal Register notice accompanying the final regulation.

We note that Congress has had opportunities to modify the proprietary exemption over the years. In this Congress, there are several bills which would accomplish this, among them S. 890 and S. 1080. However, the basic provision has remained unchanged since enactment of the APA in 1946. We question the need to single out the VA on this issue, when we have already waived our right to claim the exemption through our regulation.

Title III -- Judicial Review

As mentioned above, the VA had historically agreed with Congress' longstanding intent to bar judicial review of decisions of the Administrator. The position which we adopted in 1977, and to which we adhered through the 96th Congress in consulting with your Committee on S. 330, was twofold: First, we supported the logical extension of the Supreme Court's holding in Johnson v. Robison, supra, to permit court review of all constitutional questions arising in the Agency's administration of veterans' programs; second, we indicated we would not object to judicial review of individual benefit claims if Congress concluded legislation to authorize such litigation was desirable.

During the extensive consideration of earlier proposals to modify the statutory prohibition of judicial review, we addressed several general factors which we believed should be addressed. Most of these remain viable, even considering our basic opposition to S. 349. However, should the Congress believe judicial review is necessary, we continue to support

our previously enunciated comments. First, we recommended that any such legislation should be specifically tailored to the VA and codified in title 38, United States Code. Second, it should be provided that one must exhaust all available administrative remedies (e.g., pursue a claim to the Board of Veterans Appeals first) before having the right to sue. Third, any judicial consideration should be limited to review of the administrative record, with the court precluded from engaging in *de novo* review. Permitting only a review of the record would enable us to retain what we view as the most important feature, indeed, the hallmark of VA claim adjudication, which is the informal, non-adversary nature of our procedures. Fourth, we noted the necessity for a specific grant of subject-matter jurisdiction, and one which would deal with the jurisdictional bar at 28 U.S.C. § 1346(d). Fifth, we indicated that judicial review legislation should preclude the litigation of decisions rendered by the Agency many years ago. Finally, we pointed out the need to insure that those VA programs already subject to judicial review would remain unaffected. These concerns should be met by any judicial review legislation concerning the VA, and we observe that title III of S. 349 attempts to deal with them all.

Section 301 of the bill would take the first step toward establishing a statutory scheme for subjecting the VA to judicial review by leaving 38 U.S.C. § 211(a) in place and expanding that provision's declared list of current exceptions to nonreviewability -- insurance and loan guaranty matters -- with reference to a new chapter 72, entitled "Judicial Review." This new chapter, set out in section 302 of the bill, would contain new sections 4025 through 4029 of title 38, entitled "Jurisdiction," "Scope of review," "Remands," "Survival of actions," and "Appellate review."

Federal district court jurisdiction to review any final decision of the Administrator on a "claim for benefits" would be granted by new section 4025(a), which would require that suit be filed within 180 days of notice of the decision. Venue for such an action would be in the judicial district of either the plaintiff's home or business, or the principal offices of the BVA. New section 4025(b) would specifically rule out 38 U.S.C. § 211(a) as a bar to "a civil action otherwise authorized by law" in "any matter not directly involving a claim for benefits." A definition at new section 4025(c) would declare the nature of a reviewable decision, viz., a final BVA determination under 38 U.S.C. § 4004(a) or (b), or a dismissal of an appeal by BVA under 38 U.S.C. § 4005 or § 4008.

We respectfully offer three criticisms of the proposed section 4025(a). First, the use of the term "claim for benefits" in the jurisdictional grant could resurrect a problem of interpretation which Congress sought to eliminate more than a decade ago. As described fully in Attachment A to this report, that term used to exist in 38 U.S.C. § 211(a), and was seized upon by the Court of Appeals for the District of Columbia Circuit as a means to narrowly construe the sweep of that section's nonreviewability edict. In a series of cases exemplified by Tracy v. Gleason, 379 F.2d 469 (D.C. Cir. 1967), the court held "claim for benefits" to subsume only original claims; thus, the court concluded that the finality statute did not preclude judicial review of decisions to reduce, suspend, or terminate benefits. In a clear expression that such result was not intended, the Congress reacted by amending subsection 211(a) in 1970 to remove the controversial term. We suggest that the return of such language to title 38 could lead to a situation in which courts could, by applying a Tracy analysis to new section 4025(b), provide access to claimants seeking review of initial VA decisions reducing, suspending, or terminating benefits without the necessity of obtaining BVA decisions first.

The "claim for benefits" term is used throughout the bill and could present similar interpretation problems in many other provisions as well as the one described above. Although it is impossible to predict that a court would interpret the "claim for benefits" language in this manner, prudence dictates that any provisions granting judicial review should be clarified by statute to delineate specifically the intent of Congress. We recognize, of course, that the Committee may wish to obviate the problem by developing legislative history to clarify its intent regarding the term. There is an emerging body of case law, however, indicating that the courts will not resort to explanations in legislative history unless the statutory language itself is vague. An example is National Small Shipments v. Civil Aeronautics Board, 618 F.2d 819 (D.C. Cir. 1980). The preferable approach, we believe, would be to either define the term in question in the statute, or remove it.

A second problem we see in new section 4025(a) is the 180-day period permitted between notice of final BVA action and filing of a complaint seeking judicial review. We believe six months is too long. By the time a claim has progressed from several regional office reviews to the BVA and been decided de novo by the Board, the issues in dispute

will certainly have crystallized. In the interest of freshness of the evidence, and of expeditious handling both in the Agency and the courts, we believe a 60-day limit on the right to bring an action would be sufficient. It is noteworthy that the law pertaining to judicial review of Social Security Administration decisions observes a 60-day period.

Finally, regarding new section 4025(a), we note that the venue provision would permit commencement of an action not only where the claimant-plaintiff lives or runs a business, but also where the BVA has its principal offices. Based upon the Board's present location, the possibility exists that a disproportionate caseload burden could fall upon the District Court for the District of Columbia.

Moving on to proposed section 4025(b), which would eliminate the application of 38 U.S.C. § 211(a) as a bar to any civil action "otherwise authorized by law," we believe it could create serious problems in our administration of veterans' programs. In the first place, its inclusion in a section entitled "Jurisdiction" is misleading, since the provision is not a jurisdictional grant and would not by itself provide a jurisdictional basis for suit.

The intended purpose of this subsection would seem to be to permit judicial review of challenges to VA regulations, practices, or procedures that would be available if brought against any other Federal agency. As we stated earlier, the case law is largely accomplishing this end. Subsection 211(a) is being interpreted as limited to individual benefit decisions, so that this section of the bill is simply not necessary. We might point out that this limitation on subsection 211(a) should not result in the substitution of courts' judgment for that of the Administrator in the substance of agency regulations or other policy decisions. Such traditional defenses as standing, ripeness, and exhaustion of administrative remedies remain available. Additionally, application of constitutional standards, such as due process of law, or statutory standards, such as those in the APA at section 706 of title 5, would define the scope of review sufficiently to restrict the courts to determinations on questions of law.

Our most serious reservations, however, concern the role of the reviewing court in actions instituted under new section 4025. New subsection (g) would empower the court to enter a judgment in accordance with new section 4026 or to remand the case in accordance with either of new sections 4026 and 4027. While we do not foresee that serious problems would arise from the remand provisions (requiring the court to remand once to the Administrator for further action where either the Administrator requests remand prior to answering the complaint or the court finds there has been agency error on a factual issue; and permitting the court, in its discretion, to remand after the answer has been filed, where either plaintiff or defendant shows good cause for leave to adduce additional evidence in the claim), we still question whether the Administrator's findings of fact in benefit decisions should be judicially reviewable.

The scope of review provided in the proposed section 4026 is patterned after the general provision in the Administrative Procedure Act, at 5 U.S.C. § 706, with the major difference being that the bill does not include the substantial evidence test in the enumerated standards of review. In essence, the scope of review provided by S. 349 would empower the court to (1) decide relevant questions of law, such as those involving constitutional, statutory, or regulatory interpretation; (2) compel action unlawfully withheld by the Administrator; and (3) reverse any decisions of the Administrator found to have been made without proper compliance with constitutional, statutory, or procedural dictates, or to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Recalling our reservation about the proposed section 4025(b), we can cite an example of the ambiguity it could cause. By its terms, expressed in its first clause, new section 4026 and the standards of review it contains are to be applied by the reviewing court in any action brought under section 4025. As stated earlier, it is our understanding that subsection 4025(b), which eliminates the use of subsection 211(a) as a bar to any civil action, is not intended as a jurisdictional grant. Therefore, no civil action is to be brought under its provisions alone. However, faced with the express direction to apply the provisions of subsection 4026 to all section 4025 actions, and the fact that the elimination of the use of subsection 211(a) as a bar is found in a section entitled "Jurisdiction," a court could conclude that

Congress intended subsection 4025(b) to operate as a jurisdictional grant. Here, then, is one more reason section 4025(b) should not be where it is in the bill.

We believe that any legislation subjecting VA benefit decisions to judicial review should be drafted to avoid confusion whenever possible, but particularly in regard to the scope of review. It is our opinion that any scope-of-review provisions finally adopted should be sufficiently narrow as to permit judicial action only in those few cases in which a VA benefit may have been unjustly denied. In the same vein, it is equally important that judicial review is limited to only those questions suitable for judicial determination, and that complex and technical factual questions that can best and most fairly be decided by the Agency not be subject to second-guessing by the courts.

The bill attempts to meet these objections by restricting a reviewing court's authority to reverse a decision of the VA on a factual issue only upon a finding that the Agency's decision was arbitrary, capricious, or an abuse of discretion, and only after first remanding the case to the Administrator for reconsideration or further substantiation of the record. We recognize that the drafters' intent in selecting the "arbitrary and capricious" standard is to restrict reviewing courts to a much more narrow scope of factual review than that permitted under the "substantial evidence" standard of the APA and applied in Social Security cases. Nevertheless, legal scholars remain undecided on such basic questions as whether the substantial evidence test and the arbitrary and capricious test are equivalents and, if not, which calls for broader review. K. Davis, Administrative Law of the Seventies § 29.00 (1976). In view of this uncertainty, we are concerned that, notwithstanding the bill's attempt to narrow the reviewing court's authority by eschewing the substantial evidence test and relying upon the arbitrary and capricious test, the grant of any authority to engage in review of agency fact-finding on individual claims may encourage some courts to examine the facts de novo and substitute their findings on factual determinations for those of the administrative decision-maker.

It is our belief that the scope-of-review provisions of S. 349 could well create a situation similar to that which has developed in court review of disability claims under

the Social Security Act. In the context of Social Security cases, court review of the Agency's findings of fact has resulted in substantial criticism that the courts freely substitute their judgment for that of the Agency. As a result, the former Department of Health, Education, and Welfare submitted, in the 96th Congress, a legislative proposal that would have precluded judicial review of the agency's findings of fact and thus restricted the courts to a review of only questions of law.

In considering a similar approach to judicial review of VA benefits decisions, we realize there are some who are concerned that such a scheme might be difficult to apply in actual practice. Under this school of thought, it is believed that because many VA cases, while basically involving resolution of factual issues, present a mixture of legal and factual questions, a reviewing court might misapply the scope of review. The result could be either a refusal by the court to consider mixed questions of fact and law, leaving the claimant with incomplete judicial review, or an examination by the court of all questions on the record as legal in character, exposing the Agency to review with no significant restraints.

While we agree that a number of VA decisions involve mixed questions of fact and law, it is our opinion that limiting the reviewing court's authority to questions of law would seldom, if ever, result in either of the above situations. Distinguishing mixed questions of fact and law in individual cases is a function that the courts are well suited to perform. In addition, given the current liberal tendency of the courts, we find it unlikely that a court would refuse to review a mixed question of fact and law. It is our belief that limiting court review to questions of law would encourage the courts to review only those questions suitable for judicial determination while discouraging them from substituting their judgment for that of the Agency on complex and technical factual questions which the Agency is most competent to resolve.

Finally, it must be recognized that the additional opportunity to correct factual decisions by judicial review may be particularly inappropriate and unnecessary for VA benefit decisions in view of the Agency's liberal policy of assisting a claimant to establish his or her entitlement to every

benefit that can be supported in law. It is our belief that the necessity for judicial review of agency fact determinations is substantially reduced in a benefits program which follows, as a basic tenet, the principle that whenever the evidence raises a reasonable doubt, such doubt is to be resolved in favor of the claimant.

The remaining provisions of title III of S. 349, dealing with identification and certification of the plaintiff's records, the five-year sunset provision, survival of actions, and appellate review, present no serious problems that we can foresee. It is obvious that title III is the product of much careful thought and consultation, and meets many of the reservations which arose in connection with judicial review bills previously introduced. Nevertheless, we suggest that the problems associated with permitting judicial review of the Administrator's individual benefit decisions outweigh any perceived benefit of such review. Accordingly, we cannot support title III.

Title IV--Attorneys' Fees

Under the existing attorney fee limitation provision, 38 U.S.C. § 3404(c), the Administrator is authorized to award from allowed monetary benefits a fee of no more than \$10 to recognized claims agents or attorneys for successfully prosecuting claims before the VA.

This limitation is applicable regardless of the nature or extent of an attorney's assistance, whether it is strictly clerical, investigative, or includes the full prosecution of an appeal through the Board of Veterans Appeals. The VA regulations concerning this fee limitation may be found in 38 C.F.R. § 14.634, et seq. Those regulations further provide that expenses may be reimbursed by the claimant to the attorney or agent representative. Claimants and their representatives are expressly advised of this reimbursement for expenses provision in VA Form 1-4107, "Notice of Procedural and Appellate Rights," a form routinely used by VA regional offices in cases where a claimant has not received all of the benefits claimed.

Provisions similar to the current limit have been in effect for over 100 years. In spite of its acknowledged impact in severely restricting the availability of attorney representation for VA claimants, courts have consistently upheld its constitutionality. One of the more significant cases, if

only because of its articulation of the constitutional issues, is Gendron v. Saxbe, 389 F. Supp. 1303 (C.D. Cal.), aff'd mem. sub nom. Gendron v. Levi, 423 U.S. 802 (1975). Considering the informality of the VA claims procedure and the availability of veterans service organization representatives, the three-judge panel upheld the fee limitation against a challenge which included both due process and equal protection arguments. Another recent case upholding the constitutionality of this provision is Staub v. Roudebush, 574 F.2d 637 (D.C. Cir. 1978).

Apart from the longstanding and judicially sanctioned statutory restriction on attorney fees, it is valuable to inquire whether veterans under the current system have been well- or ill-served by such limitations. It is probably true that, except for those whose low income qualifies them for free legal services, the current fee limitation effectively precludes attorney representation before the VA. It should be noted, however, that the relatively simple procedures for making a claim and even for pursuing an appeal do not generally require the assistance of an attorney. Moreover, the wide-spread availability of free services from veterans' organizations who are able to render sophisticated and expert assistance in prosecuting a claim enables full benefits to be distributed to a veteran without any of it being consumed in expensive legal fees.

Such national service organization representatives are trained gatherers of relevant evidence, who make effective and persuasive arguments. They understand the operations, specialized procedures, and laws of the VA. They also understand the issues involved in presenting a case before the VA. Furthermore, they have experience in evaluating the potential success of claims.

Most of these laws and rules of procedures are understandable to non-legal technicians such as service organization representatives, paralegals or claims agents as well as to attorneys. VA adjudicatory procedures, as noted earlier are intended to be, and in operation are, non-adversary in nature. It has always been the policy of this agency to assist the claimant in developing facts pertinent to a claim and to resolve all reasonable doubt in favor of the claimant. In cases where service medical records do not substantiate the claim, lay evidence of the existence of a condition can be accepted.

Our experience has been that the professional service organization representatives, although usually not attorneys, have attained a high level of competence and expertise in the field of veterans' laws. In our view, the present type and availability of representation is completely adequate for VA claimants, and accordingly, in the absence of judicial review of individual benefit decisions, we are opposed to any change that would increase the present \$10 fee that an attorney or claims agent may receive for representing a claimant before the Agency.

Granted, if Congress were to enact legislation providing for judicial review of individual benefit decisions, it would probably be necessary to amend the current limitation on attorney fees. We would not oppose raising the fee limitation, or enacting a reasonable fee schedule, in that context. However, we are not yet prepared to support any significant change in the fee limitation in the absence of judicial review legislation. In addition to our general opposition to changing the current attorney fee limitation, we also have several misgivings about the specific attorney fee provisions in title IV of S. 349.

Section 401 of the bill would modify the existing \$10 attorney fee limitation of 38 U.S.C. § 3404(c) to provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws administered by the VA. This provision would not apply in cases where the VA is the plaintiff or where other attorney fee statutes are controlling.

Under this provision, in cases resolved within the agency after a claimant receives a Statement of the Case, the Administrator, pursuant to regulations, would be authorized to determine and approve attorney fees not to exceed the lesser of: (1) the fee agreed upon by the claimant and the attorney, (2) \$500 (or a greater amount in an extraordinary case or if national economic conditions change; or (3) 25 percent of any past due benefits awarded in contingency fee situations. The existing \$10 attorney fee limitation would continue to apply in those cases where the claim was resolved prior to the claimant's receipt of a Statement of the Case.

If the claimant, represented by an attorney, pursued his or her right to judicial review and the case was resolved in a manner favorable to the claimant at the court level, that is, all or part of the relief sought was granted, the court could determine and approve a "reasonable" attorney fee (to be paid by the claimant) as part of its judgment, except that if the attorney had taken the case on a contingent fee basis, the court could only award as an attorney fee an amount up to 25 percent of any past due benefits. In the event that a case appealed to court is resolved in a manner unfavorable to a claimant, the court's authority to approve a fee would be limited to a maximum dollar amount of \$750. No award for payment out of future VA benefits could be made by either the Administrator or a court. Court review of the attorney fee determination of either the Administrator or a court would be available to a claimant or an attorney. The basis of such review of a fee determination made by the Administrator would be abuse of discretion. Finally, section 401 includes a provision whereby a court could, as an extraordinary remedy in a matter involving a claim for benefits appealed to court, award a claimant, who has prevailed in court, a reasonable attorney fee to be paid by the VA as part of the court's award of costs following judgment.

Section 402 of S. 349 makes a gender change and strengthens the existing provision, 38 U.S.C. § 3405, relating to attorney impropriety, to authorize a court to punish an attorney or other person for willfully and intentionally defrauding a claimant. We note that the existing section 3404(c) allows payment to claims agents as well as attorneys. S. 349 provides only for payment to attorneys, thereby excluding the possibility of claims agents receiving any remuneration for their services, but at the same time continuing to subject them to the criminal penalties of section 3405 if they accept any payments for their service. Currently there are less than one hundred recognized claims agents nationwide, and our experience indicates that these individuals are not performing representation duties with expectations of monetary reward. In the event that the present fee limitation in section 3404 is amended, however, we believe that some provision for minimal payment to claims agents in the administrative process might be retained.

Another of our concerns is in regard to the provision for a fee in excess of \$500 in "extraordinary" cases. We believe that although such a fee may prevent a few instances of awarding unreasonably low attorney fees in complicated cases, the possibility exists that a significant number of attorneys will attempt to categorize their claims as "extraordinary" cases. Accordingly, we believe that the statute itself should provide some guidance or standards as to what would constitute an "extraordinary" case or, alternatively, grant specific authority to the Administrator to issue such standards.

Likewise, we are opposed to the provisions of proposed subsection (d) of section 3404, which would grant the court open-ended discretion in setting attorney fees at the court level where the attorney and claimant have not entered into a contingent fee agreement. In our opinion, such unlimited discretion could be abused and we therefore believe that even if no attorney-client agreement is involved a court should be limited to awarding either a definite percentage amount of past due benefits, for example 25 percent as occurs in Social Security cases, or a specific dollar amount.

Finally, in regard to the attorney fee provisions of S. 349, we object to proposed subsection (f) of section 3404 to the extent that it provides for judicial review of the Administrator's determination and approval of attorney fees. In this regard, it should be noted that attorney fee determinations made by the Social Security Administration are not subject to judicial review. We believe that any authority to determine attorney fees for representing a claimant before the VA should similarly exempt such fee determinations from judicial review.

Opening the door to court review of attorney fee determinations may engender a significant number of such cases. In an attempt to circumvent administratively determined fees, some attorneys will undoubtedly avail themselves of this opportunity to increase their fees. Although the scope of review is limited to "abuse of discretion," we believe this limitation may neither serve as a deterrent nor appreciably lessen the number of cases filed for review.

As background to our opposition of judicial review of administratively determined attorney fees, we note that the nonreviewability of final Social Security Administration fee determinations is well established in the case law. In a recent U.S. Circuit Court of Appeals decision, Copaken v. Secretary of Health, Education, and Welfare, 590 F.2d 729 (8th Cir. 1979), the court ordered dismissal of the action for lack of subject-matter jurisdiction over Social Security Administration determinations of attorney fees. The appellant attorneys had alleged that the Social Security Administration's approved fee, which was less than 25 percent of the past due benefits award, was arbitrary and capricious and an abuse of discretion. Further, they alleged that the Secretary's failure to provide an evidentiary hearing violated the due process clause of the fifth amendment. Appellants requested that the attorney fee determination be set aside and the case remanded to the Secretary to set a reasonable and adequate fee. The court held that it lacked subject-matter jurisdiction to review the Secretary's attorney fee determination because such an action is entrusted exclusively to agency discretion. The court observed that the administrative appeals procedures followed by the Social Security Administration (20 C.F.R. § 404.975) provided adequate protection even in the absence of a hearing. In addition, the court noted that a "legitimate and commendable governmental interest in utilizing maximum amounts of time and money on behalf of those the Act was primarily intended to benefit could be seriously impeded by provision of full evidentiary hearings on attorney petitions for fees." Id at 732. We fully support that conclusion and, accordingly, are opposed to judicial review of any agency attorney fee determination.

In sum, the VA's position on the concept of modification of the present attorney fee limitation is one of opposition. In the absence of judicial review of individual benefit decisions, and because of the availability of free, expert assistance offered by service organization representatives, we believe that a significant modification of the attorney fee limitation would lead only to unwarranted depletion of VA benefits by expensive and unnecessary legal fees. Likewise, even if Congress deems it appropriate to authorize judicial review of individual benefit decisions, we are opposed to certain of the modifications of the present fee limitation that would result from enactment of title IV of S. 349.

Cost Estimates

It is difficult to predict the number of dissatisfied claimants who may decide to appeal to the courts. Based upon the current workload, and using the Social Security system rate of appeals as a model, however, it may be anticipated that approximately 4,200 veterans' cases would be filed annually in Federal courts. We are unable to estimate either the costs of the increased caseload on the court system or the cost to the Department of Justice to litigate these cases.

It is estimated that the cost to the Veterans Administration of enactment of S. 349 would be as follows:

<u>Fiscal Year</u>	<u>Cost</u>
1982	9,483,000
1983	8,526,100
1984	10,574,100
1985	9,602,100
1986	9,673,100

These costs do not include any payments of attorneys' fees that may be awarded pursuant to the authority of the new subsection (i) of 38 U.S.C. § 3404. We are unable to estimate the cost of this provision since these fees will depend upon the number of claims allowed, the size of each claim allowed, the type of award and what each individual judge may ascribe as a "reasonable" fee.

In addition, these costs do not include estimated benefit costs, which would be less than \$3 million in the first year and less than \$1 million in subsequent years.

Further, given the retroactive feature of the bill, permitting any BVA denial since January 1, 1977 to be appealed to Federal court, there would be an estimated additional cost of \$13,558,200 generated in costs of litigating the previous Board denials, assuming the 20% Social Security model applies to the number which would be taken to court.

We look forward to working with your Committee and the staff in further evaluation of S. 349.

Advice has been received from the Office of Management and Budget that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,


S. L. HOFFMAN
Acting Administrator

For and in the
absence of

ATTACHMENT A

LEGISLATIVE HISTORY AND JUDICIAL CONSTRUCTION OF ADMINISTRATIVE
FINALITY IN DECISIONS ON VETERANS' BENEFITS

The historic response of both Congress and the executive branch has been to retain the concept of administrative finality and the attorney fee limitation. In considering any modification of this provision, we believe it valuable to examine closely the legislative and judicial history of the finality statute, 38 U.S.C. § 211(a), and its predecessors.

It has been clear, since long before enactment of the initial precursor statute to 38 U.S.C. § 211(a) in 1924, that the Congress intended to preserve the legislative power over congressionally provided gratuities. This principle was first stated by the Congress with respect to veterans' benefits when it enacted the Tucker Act in 1887. That Act, now codified in 28 U.S.C. § 1346(d), provides that, "[T]he district courts shall not have jurisdiction under this section of any civil action or claim for pension."

Several decisions of the Supreme Court recite the early history of the finality of decisions of the Administrator of Veterans Affairs under successively restated and strengthened statutory provisions currently set forth in 38 U.S.C. § 211(a). For example, in its 1924 decision, Silberschein v. United States, 266 U.S. 221, the court relied upon statutory provisions, enacted in 1919 and 1921, which conferred upon the chief executive of predecessor agencies of the Veterans Administration (War Risk Insurance Bureau and Veterans Bureau) regulatory and decisionmaking power (similar to that in section 210(c)) for administering the varied benefits programs entrusted to their agencies. Sustaining dismissal of an attempt for judicial review of a disability compensation determination, the Court, at page 225, upheld the then Director's authority as: "Final and conclusive, and not subject to judicial review, at least, unless the decision is wholly unsupported by the evidence or is wholly dependent upon a question of law, or is seen to be clearly arbitrary or capricious." (Emphasis added.)

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A similar decision was rendered in the 1929 decision, Williams v. United States, 278 U.S. 255, but the result there was based upon a different finality provision (former 38 U.S.C. § 620) enacted by Congress in 1926 in connection with the World War I adjusted compensation (bonus) program.

An additional finality provision (former 38 U.S.C. § 705) was enacted in 1933 as section 5 of Pub. L. No. 2, 73d Congress. That section, relating to a revised system of gratuitous benefits granted in title I of the Act, provided that:

All decisions rendered by the Administrator of Veterans Affairs under the provisions of this title, or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision. (*Emphasis added.*)

(That measure was recognized by the Supreme Court in its 1934 decision, Lynch v. United States, 292 U.S. 571, as having been enacted to remove the possibility of judicial review for such gratuitous Veterans Administration benefits as pensions and disability compensation even under the exceptions suggested in its Silberschein and Williams, *supra*, opinions as well as the case of Smith v. United States, 57 F.2d 998 (4th Cir. 1932). The court distinguished that category of "privileges" from the contractual nature of veterans' insurance benefits, and cited as established law previous decisions such as Frisbie v. United States, 157 U.S. 160 (1895), which held that no one has a vested legal or property right to such a gratuitous benefit as pension.

Efforts to limit the statutory bars against judicial review of noncontractual Veterans Administration benefit matters then shifted to the District of Columbia Circuit, United States Court of Appeals. That court held in Hines v. United States ex rel. Marsh, 105 F.2d 85 (D.C. Cir. 1939), that one of the two finality statutes then applicable to Veterans Administration benefit systems was inapplicable to determinations made under the Administrator's authority to

declare benefit forfeitures due to fraud; and also inapplicable to any administrative setoff of an overpayment of a gratuitous benefit against nonforfeited contractual benefits (insurance). Certain comments of the court are notable in view of subsequent legislative and judicial developments. Those comments, at page 89, as to the authority of the Administrator were that:

The language of the statute does not give him the power to enter judgment against the veteran in an ex parte proceeding, without notice and hearing. The mere fact that the government makes conclusive the discretion of the Administrator in granting the benefit does not carry with it a conclusiveness in discretion in taking it away retroactively. As we read the statute, Congress never attempted to vest in the Administrator a right to enter a judgment or to deprive a veteran of property without due process of law. (Emphasis added.)

Pending in Congress at about the same time was legislation (the Walter-Logan bill) which would have subjected virtually all actions of any administrative agency of the United States to judicial review. Both the House and Senate Judiciary Committees had refused to make exceptions in the measure which in turn caused concern in the authorizing committee having jurisdiction over veterans' benefits. Subsequently, that Committee approved, and the Congress enacted on August 17, 1940, a new and stronger "finality" provision (former 38 U.S.C. § 11a-2), which stated:

Notwithstanding any other provisions of law, except as provided in [statutes permitting suits on VA insurance contracts (now 38 U.S.C. § 784)] the decisions of the Administrator of Veterans' Affairs on any question of law or fact concerning a claim for benefits or payments under any Act administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decisions.

Reference to "mandamus" apparently was considered by the Veterans Administration drafters as unnecessary under the new rules of civil procedure.

In December 1940, the Walter-Logan bill was vetoed, with a Presidential message (H.R. Doc. No. 986, 76th Congress), citing an analysis by the Attorney General in which deleterious effects of the bill were listed as including judicial review of the granting or withholding of gratuitous Veterans Administration benefits. As to this and other effects of the measure, the Attorney General declared:

The ultimate consequence would be not only to swamp the courts with a flood of minor administrative matters, but to retard and hamper the work of the executive branch of the Government. The discretion which must be exercised in performance of executive duties would, to a considerable extent, be transferred to the courts.

The 1940 Veterans Administration finality section was recognized in Van Horne v. Hines, 122 F.2d 207 (D.C. Cir. 1941), cert. denied, 314 U.S. 689, reh. denied, 314 U.S. 717 (1942), as ending any exceptions to the finality rule created by the Marsh ruling, supra. Citing the Supreme Court in Lynch, supra, and other cases as to the lack of vested rights in gratuitous Veterans Administration benefits, the court found that it was the intent of Congress to withdraw from court jurisdiction every final decision of the Administrator in relation to benefit payments in the nature of gratuities.

Prior to the codification in 1957, gratuitous benefits for various categories of veterans continued to be authorized under a number of different sections of the United States Code. The three principal finality measures were: 38 U.S.C. § 426; 38 U.S.C. § 705; and 38 U.S.C. § 11a-2.

Veterans' benefits legislation, other than insurance, was codified on June 17, 1957, by the enactment of Public Law 85-56. The substance of the 1940 finality provision was restated at section 211, excepting from its reach matters arising under sections 784 (National Service Life Insurance), 1661 (education benefits for veterans of the Korean conflict),

1761 (war orphans education assistance), and under chapter 37 (loan guaranty). These provisions were carried forward in 38 U.S.C. § 211(a) with the 1958 reenactment of title 38 as positive law.

Subsequent challenges were received favorably by the Court of Appeals, District of Columbia Circuit, which narrowly construed the finality provisions of section 211(a). Those opinions which commenced with Wellman v. Whittier, 259 F.2d 163 (D.C. Cir. 1958), and culminated in Tracy v. Gleason, 379 F.2d 469 (D.C. Cir. 1967), held that the term "claim" related only to an initial claim for veterans' benefits and, therefore, the finality statute did not preclude decisions to discontinued benefits. The Tracy opinion became the springboard for approximately 450 actions in nature of mandamus by Philippine widows whose gratuitous benefits had been terminated under a Veterans Administration rule presuming remarriage in the existence of certain circumstances. Judgments against the Administrator were entered in a number of those cases, one of the grounds being that the Veterans Administration rule was not in accordance with supposed congressional intent in statute sections defining the term "widow" and setting out terms of benefit entitlement.

Those decisions of the Court of Appeals and the District Court of the District of Columbia, when called to the attention of Congress, resulted in the 1970 amendments to section 211(a) and to the sections of title 38 of the United States Code concerning widows. Section 211(a), as so amended, reads:

(a) On and after October 17, 1940, except as provided in section 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise. (Emphasis supplied.)

The legislative history of the 1970 amendments, as set forth in the report of the Committee on Veterans' Affairs, H.R. Rep. No. 1166, 91st Cong., 2d Sess. (1971), leaves no doubt of the intent of the Congress to overturn the successful court challenges to the finality statute and to make unmistakably clear that judicial review of administrative determinations of the Administrator of Veterans Affairs under all circumstances, other than the specified exceptions involving contractual matters, was intended to be precluded.

In DeRodulfa v. United States, 461 F.2d 1240 (D.C. Cir.), cert. denied, 409 U.S. 949 (1972), the effect of the Wellman and related cases was declared cancelled. With a lengthy analysis of the 1970 finality amendment as well as the preceding legislative history and judicial construction, the Court concluded, at page 1251, that section 211(a), as recently amended:

Restores the law in this circuit to its pre-Wellman condition; it sets for naught the exception to non-reviewability which the Wellman line of opinions had carried out for administratively forfeited compensation awards. It now makes it perfectly plain that no court has authority to disturb in any way the Administrator's disposition of any claim therefor.

The Court, at page 1257, further stated that:

We conclude that the fact that adjudication of claims for noncontractual benefits is confided to the Administrator of Veterans' Affairs does not alone afford ground for constitutional complaint. . . .

The constitutional adjudications find common ground in the thesis, as expressed by the First Circuit, that "veterans" benefits are gratuitous and establish no vested rights in the recipients . . . [citing Milliken v. Gleason, 332 F.2d 122, 123 (1st Cir. 1964), cert. denied, 379 U.S. 1002 (1965); and the origin of that proposition in Lynch v. United States, 292 U.S. 571 (1934), and

other Supreme Court decisions] and despite possible indication that the thesis may be waning, [with reference to Goldberg v. Kelly, 397 U.S. 254 (1970)] we are obliged to accept it unless and until it is disapproved. We think, too, that there is another predicate possessing at least an equal measure of vitality. The Supreme Court has declared that "the United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy through the courts;" [quoting United States v. Babcock, 250 U.S. 328 (1919), at 331], and, it may, "instead provide an administrative remedy and make it exclusive. . . ." [quote from Dismuke v. United States, 297 U.S. 167 (1936), at 172.]

That is precisely what Congress did in the current version of Section 211(a). . .

The finality provisions have been sustained in Milliken v. Gleason, *supra*; Redfield v. Driver, 364 F.2d (9th Cir. 1966); Wickline v. Brooks, 446 F.2d 1391 (4th Cir. 1971). In general, the finality of the Administrator's decisions has been upheld even when those decisions were alleged to be arbitrary and capricious. Hoffmaster v. Veterans Administration, 315 F. Supp. 62 (E.D. Pa. 1970), *aff'd*, 444 F.2d 192 (3d Cir. 1971); DiSilvestro v. United States, 268 F. Supp. 516 (E.D.N.Y. 1966), *rev'd on other grounds*, 405 F.2d 150 (2d Cir. 1968), *cert. denied*, 396 U.S. 964 (1969).

Perhaps the most significant decision concerning the finality statute rendered following the 1970 amendments and the DeRodulfa decision was that rendered in 1974 by the Supreme Court in Johnson v. Robison, 415 U.S. 361. There the court held that section 211(a) does not bar Federal courts from deciding the constitutionality of veterans' benefits legislation.

The plaintiff in Robison was a conscientious objector who, being exempt from military service, had performed required alternative civilian service. After being denied educational benefits under the Veterans' Readjustment Benefits Act of 1966,

he brought a class action on the grounds that the provisions of the Act making him and his class ineligible for such benefits violated the first amendment's guarantee of religious freedom and the fifth amendment's guarantee of equal protection of the laws.

The initial issue confronted by the court was the Government's contention that section 211(a) precluded court review of the constitutionality of veterans' benefits legislation. After indicating that such a construction would raise serious questions concerning the constitutionality of section 211(a), at page 367, the court stated:

Plainly, no explicit provision of § 211(a) bars judicial consideration of appellee's constitutional claims. That section provides that "the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans . . . for veterans . . . shall be final and conclusive and no . . . court of the United States shall have power or jurisdiction to review any such decision . . ."

The prohibitions would appear to be aimed at review only of those decisions of law or fact that arise in the administration by the Veterans' Administration of a statute providing the benefits for veterans. A decision of law or fact "under" a statute is made by the Administrator in the interpretation or application of a particular provision of the statute to a particular set of facts. Appellee's constitutional challenge is not to any such decision of the Administrator, but rather to a decision of Congress to create a statutory class entitled to benefits that does not include I-O conscientious objectors who performed alternative civilian service. [(Emphasis added by the court.)]

Thereafter, the court discussed the grounds upon which it based its conclusion that the most reasonable construction of section 211(a) is that its prohibitions do not extend to actions challenging the constitutionality of laws providing benefits for veterans.

First, the court found support for this narrow exception to the absolute finality provided by section 211(a) in the administrative practices of the Veterans Administration. After stating that the court will generally show great deference to an agency's interpretation of a statute when faced with a problem of statutory construction, the court cited a Board of Veterans Appeals decision in which the Board denied a conscientious objector's claim for educational assistance. Therein, the Board had also held that its decision did not reach the question of the constitutionality of the pertinent statute because this was not within the jurisdiction of the Board. The court stated, at page 3:3, that this Board of Veterans Appeals decision "accepts and follows the principle that '[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies.'"

The court also examined the legislative history of the 1970 amendment of section 211(a), and concluded that the history does not demonstrate a congressional intent to bar judicial review of constitutional questions. According to the court, the legislative history of the 1970 amendment indicates nothing more than an intent to preserve the Congress' two primary purposes in enacting the no review clause.

These two purposes were to prevent an overwhelming burden on both the Veterans Administration and the courts that would result from permitting judicial review and to prevent the courts from becoming involved in day-to-day determination and interpretation of Veterans Administration policy. Prior to the 1970 amendment, the continued existence of these two purposes was threatened by a line of decisions in the District of Columbia Circuit. Citing Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), the court, at page 373, stated that "neither the text nor the scant legislative history of section 211(a) provides the 'clear and convincing'

evidence of congressional intent required by this court before a statute will be construed to restrict access to judicial review" and concluded that section 211(a) does not preclude judicial review of the constitutionality of a statute authorizing veterans' benefits.

Even before the Supreme Court decision in Robison, Federal district courts, relying on Goldberg v. Kelly, 397 U.S. 254 (1970), had assumed jurisdiction in suits challenging the constitutionality of Veterans Administration procedures. The Goldberg case did not involve veterans' benefits. The issue in Goldberg was whether the due process clause required the holding of an evidentiary hearing before terminating the continued receipt of welfare payments. Answering this question in the affirmative, the court asserted that welfare benefits are matters of statutory entitlements. As such, the court characterized them as being more like property interests than gratuities. In addition, the court stressed that compliance with the requirements of due process was necessary to protect a recipient's right to continued payments because termination of those payments might deprive an eligible recipient of the very means to live. As a result, the court concluded that an individual's interest in a pretermination hearing clearly outweighed the Government's interest in proceeding without such a hearing. Therefore, due process requirements were violated when welfare payments were terminated without providing an opportunity for a hearing prior to such termination.

Wallace v. The Administrator of Veterans Affairs, No. 14499 (D. Conn., filed December 23, 1974), is the earliest of several unreported class action suits challenging the constitutionality of Veterans Administration procedures wherein the court assumed jurisdiction on grounds that an allegation of constitutional deprivation was a sufficient basis for jurisdiction.

In the Wallace case, the veteran's partial disability evaluation was temporarily increased to total disability during a period of hospitalization and convalescence. After hospital discharge, his evaluation was reduced to the prehospital level. Although Mr. Wallace had received notice of the

reduction as provided by 38 C.F.R. § 3.105, he filed suit alleging denial of due process because the Veterans Administration failed to grant a hearing prior to the reduction.

The court denied the Government's motion to dismiss for lack of jurisdiction based upon the prohibition in section 211(a). The court found that the plaintiff was not seeking review of a decision of the Administrator but, instead, was seeking enforcement of his due process rights to notice and a hearing prior to a decision of the Administrator to modify or terminate benefits. The court concluded that the principles established in Goldberg v. Kelly, supra, were dispositive of questions presented in Wallace.

After scrutinizing Veterans Administration procedures, the court ordered a physical examination by a court-appointed physician. The court dismissed the action after the examining physician confirmed the reduced evaluation and Mr. Wallace withdrew his hearing request. The Wallace case resulted in amendment of 38 C.F.R. § 3.103 to strengthen due process requirements by establishing more rigid guidelines for notice standards to clearly define the information to be furnished a claimant including that regarding hearing and appellate rights.

Since 1974, several Federal district courts have expanded the Robison holding as a basis for assumption of jurisdiction in suits alleging deprivation of due process under Veterans Administration adjudicative procedures. This has been coupled by an increasing tendency of some courts to insist upon review of the merits of the case prior to determining the jurisdictional issue. These courts have reasoned that jurisdiction depends on whether constitutional rights have been abridged as is often asserted by the plaintiff. Courts are particularly reluctant to dismiss actions involving hearing rights which cite the Goldberg case as precedent.

Plato v. Roudebush, 397 F. Supp. 1295 (D. Md. 1975), a recent case challenging Veterans Administration adjudicative procedures, was filed by Mrs. Marian Plato when her pension

payments were suspended in May 1974. Mrs. Plato was receiving death pension payments after an administrative decision held her free from fault in an estrangement from the veteran and thereby meeting the continuous cohabitation requirement of 38 U.S.C. § 101(c). Payment suspension resulted from information submitted by Mrs. Plato on her income questionnaire regarding her illegitimate child born during the marital estrangement. She instituted suit when she was notified of the suspension, and requested the opportunity to submit evidence to establish the veteran's possible condonation of her infidelity. She alleged abridgment of her constitutional right to due process in that she was not given an opportunity for a hearing prior to suspension of her pension payments.

While a Government-filed motion to dismiss was pending, the court certified the suit as a class action. Robert Trail then moved to intervene, stating he had been notified his pension payments would be suspended or terminated because his income questionnaire indicated his income might be excessive. He, too, alleged due process deprivation in that he had not been granted a hearing until after suit was filed; the court rejected the Government's argument that the case was rendered moot.

The court's memorandum opinion, filed May 6, 1975, addressed jurisdictional and constitutional issues simultaneously, holding that the section 211(a) prohibition against judicial review of decisions of the Administrator did not exempt the Administrator's procedural policies from constitutional review by Federal courts. The court cited the Robison case, supra, in support of its position. The court then held jurisdiction existed under the mandamus statute, 28 U.S.C. § 1361, despite precedent cases holding that section 1361 does not bestow jurisdiction on the court absent independent jurisdiction under another statute. Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364 (10th Cir.), cert. denied, 385 U.S. 831 (1966). The court said constitutional interpretation is not committed to agency discretion, but is manifestly a judicial function and found against the Veterans Administration assertion that procedural matters are solely within the Administrator's discretion.

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After assuming jurisdiction, the court scrutinized Veterans Administration hearing procedures, reviewing the recent spate of Federal cases dealing with an individual's right to a hearing before an agency may withdraw or reduce a significant property right. The court then followed the Goldberg doctrine, declaring the agency's failure to hold hearings prior to suspension, reduction, or termination of benefit payments violated constitutionally mandated due process requirements and indicated it would issue a permanent injunction requiring the Veterans Administration to amend its procedures to provide such hearings.

The Department of Justice declined the Veterans Administration request for an appeal to clarify the Plato court's expansion of the Robison doctrine. As a result, the status of the law in this area is to sustain jurisdiction in cases where the constitutionality of either veterans' benefits legislation or Veterans Administration procedures is questioned.

Several recent cases have challenged Veterans Administration regulations in the educational assistance program, and have resulted in nearly identical decisions on the issue of reviewability of Veterans Administration regulations. The first, and most important, of these cases was Wayne State University v. Cleland, 590 F.2d 627 (6th Cir. 1978), in which the Government argued in its appeal of a district court decision that section 211(a) precludes judicial review of the validity, i.e. the substance, of Veterans Administration regulations and, in the alternative, that the Administrator had sufficient authority under 38 U.S.C. § 210 to promulgate the particular regulations in question. The Circuit Court agreed with the District Court's finding that section 211(a) does not preclude challenges to the Administrator's authority to promulgate regulations, basing its opinion on three factors.

First, the court found that the reasoning of the Supreme Court in Robison, supra, that application of section 211(a) to constitutional challenges would not serve the two primary purposes of the statute was equally appropriate in the Wayne State case. The court stated at page 631:

Suits challenging the authority to promulgate regulations will not involve the federal courts in the day to day operations of the VA. Neither will our construction of § 211(a) spawn suits requesting federal courts to second guess the Administrator on the merits of particular claims

for benefits or termination of such benefits. Suits challenging statutory authority of the Administrator will not involve the courts in the complex and technical niceties of VA policies, but rather will seek a determination where the regulations have been promulgated pursuant to a congressional grant of authority.

Second, the court noted that a construction of section 211(a) to bar judicial review of Veterans Administration regulations would require finding a congressional intent to insulate from judicial review the limits of the Administrator's authority. After noting that such a construction is not supported by the legislative history of section 211(a), and that such a construction would raise serious doubts about the statute's constitutionality, the court at page 632 stated that: "neither its text nor its scant legislative history provides the 'clear and convincing' evidence of congressional intent required by the Supreme Court before a statute will be construed to restrict access to judicial review."

Finally, the court stated that its review of the cases interpreting section 211(a) further demonstrated its inapplicability to challenges to the Administrator's authority to promulgate regulations. Citing a number of cases, the court at page 632 stated:

The cases where section 211(a) has barred judicial review have all involved suits challenging the Administrator's decisions concerning individual claims for benefits or terminations of existing benefits. No decision of the Supreme Court or this court has construed section 211(a) to bar judicial review of the Administrator's authority to promulgate regulations.

Wayne State was followed in two subsequent cases where students and schools challenged the constitutionality or legality of Veterans Administration regulatory provisions. In Merged Area X v. Cleland, 604 F.2d 1075, 1078 (8th Cir. 1979), the court stated that section 211(a) "was not designed to preclude judicial review of a challenge to the Administrator's

authority to promulgate regulations" Similarly, the case of Evergreen State College v. Cleland, 621 F.2d 1002 (9th Cir. 1980) cited and followed Wayne State on the point of judicial review. It is interesting to note that Veterans Administration has not fared badly under this theory, since in each of the three the agency prevailed on the merits, and our regulations were determined to be valid.

In a similar kind of challenge to education procedures, the 9th Circuit Court of Appeals found that due process required pretermination notice and hearings in educational assistance cases. Devine v. Cleland, 616 F.2d (9th Cir. 1980). However, there were no statutory or regulatory provisions setting out procedural requirements for the Veterans Administration to follow, so that the court was concerned with its jurisdiction to review the questions. In other words, if no statute or regulation existed to challenge constitutionally, the question was whether the court could take jurisdiction under Johnson v. Robison, supra.

The court stated that it would not review the "substance" of a decision by the Administrator, but would take jurisdiction only when the constitutionality of acts of Congress was challenged. 616 F.2d at 1084. Holding that the absence of procedural protections in the statute, coupled with the failure of the Administrator to establish a regulatory procedure under his delegated authority, was the equivalent of a statutory provision, the court allowed the constitutional challenge. In that case, pretermination procedures were required, but the court specifically stated that § 211(a) prevented any substantive review of the decisions reached by the Administrator to terminate benefits following a hearing.

Based on the above, two clear lines of authority may be recognized. First, as explained in Johnson v. Robison, supra, section 211(a) precludes judicial review of individual benefit decisions. The second line of cases, following Wayne State v. Cleland, supra, clearly holds that section 211(a) may not be interpreted to preclude judicial review of the validity of agency regulations.

These cases involve a detailed analysis of the basic authorizing statute and the congressional intent to determine whether the regulations issued are within that statutory authority.

In the few recent cases which do not involve statutes or regulations, there is a split of authority. In a 1977 ruling by the 5th Circuit in Anderson v. Veterans Administration, 559 F.2d 935, the veteran had argued constitutional deficiencies in the hearing procedures employed in his claim, and that he was otherwise unconstitutionally discriminated against in the denial of benefits. The court flatly held that since the constitutional challenge was directed at the action of Veterans Administration officials rather than the validity of legislation, it did not fall within the Johnson v. Robison exception to section 211(a). This holding was followed in Cox v. Veterans Administration, 470 F. Supp. 1208 (N.D. Texas 1979).

On the other hand, the U.S. District Court for Vermont in Dumas v. Cleland, 486 F. Supp. 149 (D. Vt. 1980), approached a similar question entirely differently. At issue there was the VA's termination of a veteran's wife's status as spouse-payee of his disability compensation. Ruling that it had jurisdiction to review that matter (although finding for the Government on the merits), the court held that section 211(a) bars review only of those agency actions that involve interpretation or application of a particular provision of the statute to a particular set of facts, and does not bar a claim that the Veterans Administration's procedures violate due process.

Taking the middle ground was Carter v. Cleland, 643 F.2d 1 (D.C. Cir. 1980). Plaintiffs, who had been denied entitlement to survivors' benefits on the basis that they had been separated from their veteran-husbands for years prior to the veterans' deaths, and had each given birth to children by a man other than her husband during the separation, sought judicial review after unsuccessful BVA appeals. They alleged that an administrative guideline in a VA adjudication manual, which directed that giving birth by another during separation would generally preclude one from receiving survivors' benefits, was unconstitutional or, in the alternative, exceeded the Administrator's statutory authority to promulgate regulations. The court rejected both arguments, finding that the challenged guideline was neither an irrebuttable presumption so as to raise a due process question,

nor a regulation so as to require a Wayne State analysis. Accordingly, the court held that plaintiffs were really attacking the Administrator's final decisions on their individual benefit claims, and that such challenges were beyond the court's jurisdiction because of section 211(a).

ATTACHMENT B

VETERANS ADMINISTRATION ADJUDICATION AND APPELLATE PROCEDURES

Current Veterans Administration claims procedures are designed to afford full due process to claimants and to minimize the possibility of arbitrary and capricious decisions or abuse of discretion by the Administrator. These procedures are defined by statutes and regulations which charge the Veterans Administration with the duty to assist the claimant in developing the facts pertinent to his or her claim and to render a decision which grants the claimant every benefit that can be supported in law, 38 C.F.R. § 3.103. Further, if the evidence presented raises a reasonable doubt regarding service origin, degree of disability, or any other point, regulations require that doubt is to be resolved in favor of the claimant, 38 C.F.R. § 3.102.

The most salient characteristic of the Veterans Administration claims process is its informality. In most cases, a claimant may submit his own application without need of any assistance, and without an attorney. If a claimant desires assistance, or needs advice, he has access to Veterans Administration employees who specialize in answering inquiries and assisting in the development and submission of claims. At the same level, there exists a wide network of veterans' service organizations which furnish competent claims specialists at no charge to assist a claimant in the presentation of his claim.

Veterans Administration adjudicatory procedures are intended to be nonadversary in nature. In almost all cases, a claimant need do nothing more than file his claim. Although adjudication of the claim will actually take place at one of our 58 regional offices, the claimant may personally file or mail a claim to any Veterans Administration facility. The Veterans Administration maintains a number of Veterans Services offices in various states to assist claimants. In addition, Veterans Benefits Counselors are assigned to hospitals, domiciliaries, nursing homes and out-patient treatment centers to assist claimants in this regard. All claims received are forwarded to the appropriate regional office for adjudication.

Adjudication of the claim can generally proceed without the necessity of the claimant appearing at a hearing, producing further evidence, or presenting witnesses, etc.

The agency will procure the records of military service and medical treatment basic to most claims. Where these records prove insufficient to establish the benefit being sought, the claimant is clearly told, whenever possible, what evidence would be required and what sources are acceptable. As noted, it has always been the policy of the agency to resolve all reasonable doubt in favor of the claimant, and in cases where service medical records do not substantiate the claim, lay evidence of the existence of a condition can be accepted. All evidence which has been submitted by a claimant, or is obtained by the agency, is considered in arriving at a determination on the claim.

Once a decision has been reached, the Veterans Administration must provide the claimant with notice of the decision as well as notice of hearing and appellate rights. (A sample of the form providing this notice is attached as Exhibit 1.) A claimant is entitled to a hearing on any issue at any stage in the proceedings. At a hearing, claimants may produce witnesses to testify on their behalf and may adduce evidence of any nature whatsoever in support of their claim. If the decision at issue is one rendered by a rating board, the hearing is conducted by the rating board members who participated in the decision. If the hearing relates to other than a rating decision, it is held before a panel of three members, including the person who made the initial decision. While the right to question witnesses present is provided by the hearing procedures, there is no requirement for the Administrator to subpoena witnesses required by the claimant. Although the Administrator has subpoena authority pursuant to 38 U.S.C. § 3311, it is discretionary and seldom exercised to require the appearance of a witness at a hearing.

Any decision with which a claimant disagrees may be appealed within the agency. An appeal is initiated by filing a Notice of Disagreement with the action in question within one year from the date of notification thereof. This can be a simple declaration of disagreement with such action. On receipt of a Notice of Disagreement, the regional office reevaluates the veteran's claim. If the denial is continued, the claimant is provided, usually within 90 days of receipt of

the Notice of Disagreement, with a Statement of the Case. The provisions of 38 U.S.C. § 4005 require that the Statement of the Case contain a summary of the evidence, citation or discussion of the pertinent laws and regulations, and the decision on the issue as well as the reasons therefor. The Statement of the Case is designed to assist the claimant to understand the law and the evidence relied upon, as well as the evidence lacking to establish entitlement. With the Statement of the Case, the claimant is provided with a form which provides him with instruction for completing his Substantive Appeal. (A sample of this form is attached as Exhibit 2.) The claimant is also notified of his right to appear at a personal hearing before the Board of Veterans Appeals in Washington, D.C. The personal hearing may also be held before a traveling section of the Board of Veterans Appeals which makes periodic appearances at regional offices. In lieu of either of these alternatives, a claimant may also request a hearing on appeal before members of the regional office, the transcript of which is forwarded to the Board of Veterans Appeals in Washington.

Following any hearing and the timely receipt of a Substantive Appeal, the case is certified to the Board of Veterans Appeals. After a complete and independent review of the claim on the basis of all of the evidence of record, the Board renders its decision. The Board's action may be to allow the claim, deny it, or remand the case to the regional office having jurisdiction for further development. In the absence of obvious error of a material and reversible nature, the Board's decision is final. Section 4004 of title 38 requires that all Board decisions contain separately stated findings of fact and conclusions of law. As a matter of formal policy all Board decisions contain a summary of the contentions and evidence, a concise statement of applicable laws and regulations and a discussion and evaluation intended to answer contentions and afford a complete explanation of the issue disposition.

Over the years, the Veterans Administration has constantly reviewed and evaluated its procedures to comply with the evolving concept of due process. Due process provisions for compensation cases have been in effect since long before Goldberg v. Kelly, supra, and its progeny, including the Plato case, supra. As early as 1946, the Veterans Administration by regulation provided for notice

and opportunity for a hearing prior to reduction of a compensation award because of a change of physical condition. In 1955, that procedure was broadened to include circumstances where severance of service connection was proposed due to administrative error in an earlier grant of benefits. As the result of extensive hearings conducted by the House Committee on Veterans' Affairs in 1960 and 1962, statutory and regulatory amendments were adopted which provided that reduction of compensation occur only at the end of the year where such reduction was based on an unexpected change in the status of a veteran's dependents, e.g., if a divorce occurred or if a child married during the preceding year. Under this provision, the veteran received notice of a change in benefit payments and an opportunity for hearing well before any reduction in payment actually occurred.

Similar changes were made in the other benefit programs to delay reduction or termination of payments due to a change in dependency or in financial status until the end of the calendar year in which the change occurred. Thus, an individual receiving benefits was provided an opportunity for hearing or to submit controverting evidence prior to the effective date of the change in payments. An additional change was made following the Plato decision when the Veterans Administration amended its procedures to provide for notice and opportunity for hearing before reducing, suspending, or terminating a running award for pension benefits. Those same procedures were later expanded to include persons receiving dependency and indemnity compensation and death compensation.

In addition, agency procedures concerning incompetency determinations were recently amended to provide for notice and opportunity for hearing prior to a rating of incompetency or suspension of payments on grounds of alleged incompetency. The same due process provisions were extended to allegedly incompetent, nonveteran beneficiaries. Under the changed procedure, an individual may not be considered incompetent by the Veterans Administration without having had an opportunity to contest the finding of incompetency. Moreover, the supervised direct pay program for incompetent beneficiaries has been modified to limit the period during which partial payment of the available benefit could continue. The change is consonant with the purpose of the supervised direct pay program, which is to determine whether a beneficiary is capable of handling funds.

In addition, procedures were modified to provide notice and opportunity for hearing prior to restriction of funds of patients hospitalized in Veterans Administration facilities. Under this change, when a person is admitted as a patient to a Veterans Administration hospital or domiciliary, such person will be furnished notice of the hospital rules concerning deposit of personal funds and permitted an opportunity to contest any proposed restriction of funds.

Procedures were recently published to comport with due process requirements in cases where liability for overpayments has been assessed against a school for failure to report changes by individual student veterans. The change broadens the scope of due process previously provided in school liability cases. The notice provisions are more clearly defined and hearing procedures enlarged to include a prehearing conference. The prehearing conference allows for defining and clarifying issues and enables school officials to document evidence for submission at the later hearing.

This same concern to provide due process to veterans is also demonstrated by changes in appellate procedures. For example, in the early 1960's, concern was expressed over the absence of judicial review of decisions of the Administrator. As a result, the House Committee on Veterans' Affairs conducted hearings in 1960 and 1962 on several bills proposing court review. During the course of these hearings, it was established that the interests of veterans would be best served by enactment of certain procedural changes rather than subjecting Veterans Administration decisions to judicial review. In general, these changes were designed to insure that the veteran not be denied due process of law as defined by the standards of that era.

Specifically, these changes were patterned after findings obtained by a study of the appellate procedures of the British Pension System. This study determined that the English appellate system was not a judicial system in the strict sense. Although the English system includes appellate bodies designated as tribunals, they are not true courts as we know them. Instead, they function as administrative boards whose practical operations are not too different from the operations of the Board of Veterans Appeals.

The statutory procedural changes that resulted from the hearings have remained substantially the same to the present day. Perhaps the most important of these changes was the requirement that a claimant be provided with a Statement of the Case. As explained above, a Statement of the Case provides a claimant with both a summary of the evidence and law upon which the agency reached its initial decision. This, of course, provides the claimant with all of the information necessary to enable him to present the best possible arguments to support his claim on appeal. This constituted a substantial modification in our earlier procedures which merely provided a claimant with a brief notice of the reason for the disallowance of his claim without a detailed discussion of the evidence, regulations, or laws upon which that disallowance was made.

Another procedural change that resulted from the hearing and which was also patterned on the British Pension System was the authorization to use independent medical experts to resolve conflicts of evidence. In enacting this legislation, Congress recognized that the use of such experts was warranted by the medical complexity and controversy that could arise in an appeal case. Congress also recognized the necessity of insuring the complete independence of such experts by providing that arrangements be made with recognized medical schools or clinics to provide advisory medical opinions. These arrangements were to provide that the actual selection of the expert in any individual case was to be made by an appropriate official of the medical school or clinic, not by the agency.

A final change in the Board of Veterans Appeals' decision-making process which resulted from the Committee hearings was the elimination of the Board's participation in the development and formulation of agency policy. Although this separation of function was not accomplished by legislation, it was believed necessary to achieve judicial detachment and autonomy. We believe that the fact that such a change could be achieved without legislation provides an example of the agency's willingness and desire to modify our procedures whenever necessary to insure fair and thorough adjudication of a veteran's claim for benefits.

We believe these changes, which are generated in part by court challenges and in part by the agency's own continuing independent review of its regulations, are positive changes which provide veterans increased procedural protection which corresponds with the law's evolving concept of "due process." In addition, we believe that the current Veterans Administration procedures, which incorporate those changes, meet the requirements of fundamental fairness and, in fact, compare favorably with procedures of other governmental agencies or departments administering benefit programs. For example, a Veterans Administration claimant is by regulation entitled to a hearing at any stage of the administrative processing. By contrast, in Social Security Administration cases, a hearing is not available until the appellate level. Finally, we believe that our procedures remain attuned to the needs of the veterans we serve and will enable the agency to continue to provide maximum services to veterans of all eras.

NOTICE OF PROCEDURAL AND APPELLATE RIGHTS

We have based our decision on the evidence of record in your case and the applicable law. This explains your procedural and appellate rights in connection with this decision.

REPRESENTATION. You may be represented, without charge, by an accredited representative of a veterans organization or other service organization recognized by the Administrator of Veterans Affairs, or you may employ an attorney to assist you with your claim. Typical examples of counsel who may be available include attorneys in private practice or legal aid services. The services of a recognized attorney are subject to a maximum fee limitation of \$10, set forth in 38 U.S.C. 3404(c). Expenses incurred in the prosecution of a claim must be approved in accordance with 38 C.F.R. 14.650 prior to demanding or receiving reimbursement from the claimant. If you desire representation, let us know and we will send you the necessary forms. If you have already designated a representative, no further action on your part is required.

NEW EVIDENCE. You may submit additional evidence to strengthen your claim. It is in your interest to send us any new evidence as promptly as possible. We will carefully consider it and let you know whether it changes our decision.

PERSONAL HEARING. If you desire a personal hearing to present evidence or argument on any point of importance in your claim, notify this office and we will arrange a time and place for the hearing. You may bring witnesses if you desire and their testimony will be entered in the record. The VA will furnish the hearing room, provide hearing officials, and prepare the transcript of the proceedings. The VA cannot pay any other expenses of the hearing, since a personal hearing is not required.

APPEAL. You may appeal our decision to the Board of Veterans Appeals at any time within one year from the date of this letter if you believe the decision is not in accord with the law and the facts now of record. You can start the appeal process by filing a Notice of Disagreement. You may do this by writing a letter to this office stating that you wish to appeal. If more than one benefit is involved, you should identify the benefit or benefits for which you are appealing. If you decide to appeal, we will advise you further as to your procedural rights as your claim progresses through the several stages of the appeal process.

VA FORM 9-4107
AUG 1975

EXISTING STOCKS OF VA FORM 9-4107 MAY 1975
WILL BE USED.

Exhibit 1

Form approved
OMB No. 75-8034

VETERANS ADMINISTRATION APPEAL TO BOARD OF VETERANS APPEALS		
IMPORTANT: Read instructions on reverse side before filling in form. Complete all items fully. Send this appeal to the VA office which made the decision being appealed.		
1. LAST NAME - FIRST NAME - MIDDLE NAME OF VETERAN (Type or print)	2. INSURANCE FILE NO., OR LOAN NO. (If permanent)	3. CLAIM FILE NO. (Majority of cases)
4. IF APPEAL IS BEING MADE BY A PERSON OTHER THAN VETERAN INDICATE RELATIONSHIP ☐ WIDOW ☐ CHILD ☐ MOTHER ☐ FATHER ☐ OTHER (Specify)		
5. NAME OF CLAIMANT (If other than veteran)		6. ADDRESS OF CLAIMANT (Number & street, city, State & ZIP Code)
7. DATE OF DECISION BEING APPEALED	8. VA OFFICE WHICH MADE DECISION BEING APPEALED (City & State)	
REPRESENTATION See Par. 6 of Instructions on reverse side.		
HEARING See Par. 7 of Instructions on reverse side. 9A. IS A HEARING DESIRED? ☐ YES ☐ NO		9B. IF YES, SPECIFY PLACE ☐ FIELD OFFICE ☐ WASHINGTON, D.C.
10. I TAKE ISSUE WITH THE DECISION CITED ABOVE AND HEREBY PETITION THE BOARD OF VETERANS APPEALS FOR RELIEF AS SET FORTH BELOW. (State in specific detail the benefits sought on appeal and your reasons for believing that the action appealed from is erroneous. Follow carefully the instructions in paragraph 3 on the reverse side.)		
(Attach additional sheets, if necessary)		
11. DATE	12. SIGNATURE OF CLAIMANT (Or representative)	

MISSION OF THE BOARD OF VETERANS APPEALS

The Board of Veterans Appeals was established by law to decide appeals for benefits under laws administered by the Veterans Administration (38 U.S.C. 4001 - 4009). Decisions are made by the Members of a Section of the Board, appointed with the approval of the President. It is the mission of the Board to decide appeals with sympathetic understanding and as promptly as possible, in order to grant all benefits to which veterans and their dependents and beneficiaries are entitled. Decisions are based on the entire record.

GENERAL INFORMATION

The law grants the right to have an adjudication decision reviewed on appeal by the Board of Veterans Appeals. (38 U.S.C. 4004(a)). If you want to appeal, the procedure is as follows:

- (1) Write the Veterans Administration office expressing disagreement or dissatisfaction with the decision on the claim. This is a "Notice of Disagreement." It must be filed within 1 year from the mailing of notice of the decision (60 days where 2 or more persons claim same benefit).
- (2) A "Statement of the Case" is then sent the claimant and his representative by the Veterans Administration office. It contains a summary of the facts, the applicable law and regulations and gives the reasons for the decision. Its purpose is to give the claimant sufficient information to complete his appeal in the most effective manner, if appellate review is still desired.
- (3) File a "Substantive Appeal." This completes the appeal. Use this form (VA Form 1-9). Follow the instructions below.

PRIVACY ACT NOTICE

The information requested on this form is solicited under 38 U.S.C. 4005(d)(3)(4). It is used by the Board in identifying those areas of disagreement requiring appellate review, and is mandatory for completion of your appeal. The information may be disclosed outside the VA as permitted by law, or as stated in the "Notices of Systems of VA Records" which have been published in the Federal Register in accordance with the Privacy Act of 1974. Failure to furnish this information will have no adverse effect on any other benefit to which you may be entitled.

INSTRUCTIONS

IMPORTANT: Use this form to file a substantive appeal only after receiving the statement of the case referred to above.

1. WHO CAN SIGN A SUBSTANTIVE APPEAL. A substantive appeal may be signed by:

- (a) The claimant personally.
- (b) The accredited representative of a service organization provided a proper power of attorney is filed, or by an attorney provided a proper declaration of representation is filed.
- (c) The guardian or other proper fiduciary of an incompetent claimant, or, if none, by the next of kin or next friend.

2. **TIME LIMIT FOR FILING.** A substantive appeal should be filed within 60 days after the statement of the case is mailed (30 days where 2 or more contesting claimants are involved). The 30-day period applies only where one claim is allowed and another denied, or allowance of one claim would result in a lesser payment to another claimant. An extension of time may be granted for good cause. A substantive appeal postmarked prior to expiration of the applicable period will be accepted as timely filed. (38 U.S.C. 4005(d)(3), 4005A(b)).

3. **FORM OF APPLICATION.** This form should be used for filing a substantive appeal. The benefit sought must be clearly identified. The date of the action appealed should be inserted in item 7. In completing item 10, care should be taken to set out errors of fact or law believed to have been made in the decision—that is, the reasons for disagreeing with the decision being appealed. Insofar as possible, relate all statements to specific items in the statement of the case. Identify any statement of fact in the statement of the case with which there is disagreement. The claimant will be presumed to be in agreement with facts stated to which no exception is taken. An appeal which is insufficient may be dismissed.

4. **PLACE TO SEND SUBSTANTIVE APPEAL.** The substantive appeal should be mailed to or filed with the Veterans Administration office which entered the decision being appealed.

5. **SUBMISSION OF ADDITIONAL EVIDENCE.** Where a substantive appeal is timely filed, a reasonable time will be granted, if requested, to file additional evidence before final consideration of the appeal. Any additional evidence should be submitted to the Veterans Administration office in which the appeal was filed.

6. **REPRESENTATION.** A claimant may be represented in the presentation of his claim by a recognized service organization provided a proper power of attorney is furnished, or by an attorney provided a proper declaration of representation is furnished. Only one representative is permitted at any one time in the prosecution of a specific claim. A form for filing power of attorney may be obtained from the local Veterans Administration office. (38 CFR 19.129, 19.130, 19.132)

7. HEARING ON APPEAL (Read carefully).

a. **Hearing Granted, If Desired, And Conducted Informally.** A hearing will be granted where a claimant or his representative expresses a desire for a personal appearance. The Board operates under Rules of Practice, but its procedures are informal. They are designed to make it easy for a claimant or his representative to present argument or testimony relevant and material to the appellate issue. Strict rules of evidence are not followed. All evidence on file is thoroughly considered regardless of whether a hearing has been held.

IMPORTANT: If a hearing is desired, such request should be made by completing items 9A and 9B, indicating the place of hearing—Veterans Administration field office or Washington, D.C. (See subparagraph c below.)

b. **Who May Appear.** The claimant, his representative, or both, may be heard. Either may arrange for the voluntary appearance of witnesses to testify.

c. **Place of Hearing.** A hearing may be held at one of the following places selected by the claimant or his representative:

- (1) In Washington, D.C., before a Section of the Board of Veterans Appeals.

- (2) In the Veterans Administration field office which originally decided the claim or, if more convenient, any other Veterans Administration field office which has appropriate personnel and technical facilities for conducting a hearing. In that event, the field office personnel act as a hearing agency for the Board of Veterans Appeals, but do not decide the appeal.

There is no provision for the Government to bear any expense incurred by the claimant, his counsel or witnesses in connection with attendance at a hearing.

8. **ORDER OF CONSIDERATION.** Appeals are docketed and considered in the order in which they are received, except that for sufficient cause the Board may advance a case on the docket. (38 U.S.C. 4007.)

FOR VA USE ONLY

APPEAL RECEIVED (VA Date Stamp)

APPEAL RECORDED (Date)

Reverse side of VA Form 1-9

ATTACHMENT C

Attorney Fees

When considering the present attorney fee limitation, it is useful to examine the history of 38 U.S.C. § 3404 together with current veterans' representation practices. For over 100 years the law has contained provisions reenacted several times establishing a fee limitation for attorneys and claims agents representing claimants before the Veterans Administration for benefits purposes. As early as July 14, 1862, Congress limited the fees of agents or attorneys who assisted claimants. The basic fee at that time was \$5, with additional small amounts authorized under certain conditions. The early legislative history gives some insight into the reasons for the fee limitation. During debates of the Act of July 8, 1870, 16 Stat. 194, 38 U.S.C. § 114, which increased the fee limitations to \$25 (where the parties had agreed to a fee) and to \$10 in all pension cases where no compensation for services was agreed to between the parties, Congressman Butler referred to claims agents as "the sharks who prey upon the pensioners."

A \$3 fee limitation was established in 1918 under an amendment to the War-Risk Insurance Act, section 13 (40 Stat. 555). The fee limitation came in response to a rash of complaints that unscrupulous claims agents and attorneys were canvassing World War I veterans, fabricating claims, and harassing the families of veterans in initiating claims under the newly enacted War-Risk Insurance Act. These attorneys were apparently charging the upper limit of fees for work which was essentially clerical in nature. A flat fee limitation of \$3 was fixed in connection with the presentation of claims. When the War-Risk Insurance Act was codified in 1924 as the World War Veterans' Act, the \$3 limit was increased to \$10, where it has remained.

It is quite clear from the floor debates that the intent of the legislation was to protect veterans from the predatory practices of unscrupulous claims agents and lawyers:

It is not the intent of Congress that these mercenary claim-agent leeches should sap the blood of any financial benefit from the Government by putting up these false claims and establishing their right to this 10 percent commission for doing nothing, and doing what the Government itself intends to do in every individual case. (56 Cong. Rec., Pt. 5, p. 5222 (April 17, 1918))

However, it is also clear that the \$3 fee limitation was intended to apply only to the minimal effort involved in filing an original application for benefits. The statutory language itself reads: ". . . payment to any attorney or agent for such assistance as may be required in the preparation and execution of the necessary papers shall not exceed \$3.00 in any one case" (40 Stat. 555)

Indeed legislative history makes clear that it was the expressed intent of Congress to exclude attorneys from any participation in presentation of claims beyond the assistance occasionally necessary in filling out application forms. ". . . [N]o claim agent or attorney shall be recognized in the presentation or adjudication of claims under articles two, three, and four" (40 Stat. 555-56). Again the legislative history makes this clear:

Unless there is still some joker we have not discovered, enactment of this bill will absolutely prevent applications being made by claim agents in behalf of beneficiaries under the act who would prevent them from obtaining all that is justly their due.

There is no need for the intercession of agents or attorneys in these claims. . . . (56 Cong. Rec., Pt. 5, p. 5222 (April 17, 1918))

Yet the legislators were not entirely blind to the possible abuses of fee limitation, and in 1918 the possible hardships to veterans were foreseen:

Mr. JUUL: Mr. Speaker and gentlemen, I am for this bill. I realize that it is a necessary bill and it should pass, but I am afraid that the \$3.00 limitations and a provision in the penalty clause of the bill is going to work harm. I know of cases where three consecutive sets of papers in a single case are and have been missing for claims arising since the war, where allotments have not been made, and where people are suffering for the want of having the allotment made If a claimant today (sic) in any State in the Union goes out and tells an attorney that he is

limited to \$3.00, that he has waited three or six months to get action on his claim, he is going to get no legal service that can be of any value to him, and I think a provision which would keep a claimant from applying to people who can be of service to him would be a mistake. (56 Cong. Rec., Pt. 5, p. 5225 (April 17, 1918))

It should be observed that Federal courts have consistently upheld the constitutionality of 38 U.S.C. § 3404(c) and 38 U.S.C. § 3405. See for example, Margolin v. United States, 269 U.S. 93 (1925); Hines v. Lowery, 305 U.S. 85 (1938); Gendron v. Levi, 423 U.S. 803 (1975), *aff'g.*, sub. nom., Gendron v. Saxbe, 389 F. Supp. 1303 (C.D. Cal. 1975); and Hoffmaster v. Veterans Administration, 444 F.2d 192 (3d Cir. 1971).

In the Gendron case, *supra*, the three-judge district court panel reviewed the informal Veterans Administration claims procedure, and held that the \$10 fee limitation, when viewed in the context of the entire procedure, including certification of representatives, did not deny a claimant either due process of law or equal protection of the laws. In reviewing congressional intent, the court stated, at page 1307:

Congress, having in mind the availability to veterans of experienced lay persons to represent them in applying and qualifying for benefits, along with the facilities provided by the Government, as set forth in Section 3402, Title 38 U.S.C., appears to have concluded that the provisions for the representation of veterans was quite adequate. More elaborate procedural requirements involving adversary hearing would make proceedings necessarily burdensome and lengthy to the end that there would be long delays to the detriment of the veterans, as well as the creation of a great drain on the funds provided for their comfort. Having in mind the effective measures it had taken for the representation of veterans without charge Congress could

properly limit to a nominal sum the fee paid to one representing a veteran as an agent or attorney without prejudicing the veterans rights.

The purpose of sections 3404(c) and 3405 was stated by the Court in Staub v. Johnson, 519 F.2d 298 (D.C. Cir. 1975), at page 300, to be as follows:

While this statute does not by itself prohibit the payment of additional fees by the veteran himself, section 3405 imposes criminal penalties on anyone accepting fees in excess of these limits. The intent of this statutory scheme is to protect veterans from predatory fee practices by attorneys, but it also reflects a congressional judgment that VA proceedings are non-adversary and thus retained counsel are unnecessary.

Upon remand the court in Staub v. Roudebush, 424 F. Supp. 1346 (D.D.C. 1976), granted summary judgment and held that section 3404(c) did not deny due process and did not infringe upon the First Amendment right to free association and consultation with legal counsel. However, on appeal of the summary judgment order the court in Staub v. Johnson, 574 F.2d 637 (D.C. Cir. 1978), vacated the grant of summary judgment on the merits and remanded the case with directions to dismiss the complaint for lack of subject matter jurisdiction because the plaintiff had no standing to bring the action.

[No. 39]

COMMITTEE ON VETERANS' AFFAIRS, U.S. SENATE

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C., July 21, 1981.

HON. ALAN K. SIMPSON,
Chairman, Committee on Veterans' Affairs,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your request of May 4, 1981, for the views of this Office on S. 349, the "Veterans' Administration Adjudication Procedure and Judicial Review Act".

In its report and testimony before your Committee on S. 349, the Veterans' Administration explained in detail its reasons for concluding that this legislation is neither necessary nor advisable.

We agree with the VA's position and, accordingly, do not favor enactment S. 349.

Sincerely,

JAMES M. FREY,
Assistant Director for
Legislative Reference.

(1)

[No. 40]

COMMITTEE ON VETERANS' AFFAIRS, U.S. SENATE

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF THE ASSISTANT ATTORNEY GENERAL,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, D.C., January 29, 1982.

Hon. ALAN K. SIMPSON,
Chairman, Committee on Veterans' Affairs,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This responds to your request for the views of the Department of Justice on S. 349, a bill to amend title 38 of the United States Code to establish procedures for the adjudication of claims for benefits under laws administered by the Veterans' Administration. This legislation will represent a departure from existing practice with concomitant substantial costs to the Government. The Department defers to the Veterans' Administration with respect to whether such changes should be effected at this time. However, we do wish to comment on certain provisions of S. 349 which especially concern the Department of Justice.

The Department of Justice previously provided indepth comments on S. 364 (95th Congress), which also provided for judicial review of veterans' benefits determinations. One reservation we had concerning the bill was the lack of specific procedures for the adjudication of benefit claims. S. 349 (97th Congress) provides detailed procedures for claim disputes. For example, evidentiary practices, such as burden of proof, subpoena methods, and use of expert testimony, are set forth in sections 101 through 109. Sections 301 and 302 specify a procedure for judicial review in the United States district courts with review in the courts of appeals and the Supreme Court. We analyzed the procedures in sections 101 through 109, 301, and 302 of S. 349 and believe that these procedures provide adequate detail of the adjudicatory process.

Although the Department defers to the views of the Veterans' Administration on the need for the judicial review provisions in the bill, we note that courts tend to disfavor statutory restraints on judicial review and to construe such finality provisions narrowly. For example, the Supreme Court has held that the finality clause pertinent to the Veterans' Administration, 38 U.S.C. § 211(a), does not preclude judicial review of constitutional challenges to Veterans' Administration laws. *Johnson v. Robison*, 415 U.S. 361 (1974). Similarly, in *Wayne State University v. Cleland*, 590 F. 2d 627 (6th Cir. 1978), the Sixth Circuit held that 38 U.S.C. § 211(a) does not preclude review of claims that Veterans' Administration regulations exceed their statutory authority.

In our view, the enactment of this legislation will increase litigation and greatly increase the caseload of the Department of Justice. This increase is a natural result of a bill which provides access to the courts to a large class of claims not previously subject to judicial review. In the 1978 hearings on a predecessor bill to S. 349, the Department of Justice estimated that 21 attorneys and 24 clerical positions would be required to handle the estimated 4,600 cases that would arise annually under the bill. S. Rept. No. 96-178, 96th Cong., 1st Sess. 131. The cost of this expansion was projected to be \$885,000 for personnel and \$535,000 for support costs, totaling \$1,420,000. Of course, the costs today for such personnel and support are much greater.

Nor would the impact of S. 349 be limited to the Department of Justice. In the 1978 hearings discussed above, we estimated that eight new district court judgeships and one new circuit court judgeship would be required for review of veterans' benefits cases. We noted that the Administrative Office of the United States Courts estimated that each new circuit court judgeship would require three staff positions, each new district court judgeship would require five new staff positions, and the projected caseload would require 46 deputy clerks. At that time, personnel costs for these positions were \$2,054,000 and supporting costs were \$978,000, for a total of \$3,032,000. S. Rept. No. 96-178, 96th Cong., 1st Sess. 131. Once again, the current costs for such personnel and support are much greater.

The Department of Justice experienced significant caseload problems after the adoption of a similar provision for judicial review of social security benefits determinations. For example, in fiscal year 1980, 7,814 social security benefits cases were filed. These cases, combined with those filed in prior years, resulted in a pending caseload of approximately 20,000 cases. These cases account for almost 40 percent of the cases pending against the Federal Government. We would expect to encounter a similar expansion of our caseload were S. 349 enacted. We note that the Committee has decided not to include a substantial evidence test in the standard of review in an effort to avoid some of the caseload problems associated with the use of this test in the social security area. However, as the Committee recognized in its report on S. 330 (S. Rept. No. 96-178, 96th Cong., 1st Sess. 49 (1979)), the Committee's exclusion of the substantial evidence test would still permit factual review under an arbitrary capricious or abuse of discretion standard. While this narrower standard of review may decrease the number of appeals which will successfully raise evidentiary challenges, we doubt that it will decrease the number of cases which raise evidentiary challenges.

We reviewed comments submitted to your Committee by the American Bar Association (ABA) which question the accuracy of our projections. We remain convinced of the accuracy of our estimates. We note that most of the ABA's comments are undocumented and we remain confident that our evaluation of the potential effects of S. 349 on the Department of Justice is accurate. Further, our review of the comments suggest that they are erroneous. For example, the ABA contends that the effect of a veterans' benefits denial is less severe than that of a social security benefits denial and hence veterans' benefits decisions

are less likely to be appealed. The ABA claims that social security cases often turn on the "all or nothing" question of whether a disability prevents an individual from engaging in gainful employment, while the "vast majority" of veterans' benefits cases involve the upgrading of previously awarded disability ratings. Information received from the Veterans' Administration, which we understand was submitted to the Committee on August 28, 1981, in response to inquiries from Senator Simpson, indicates that only 24 percent of the cases before the Boards of Veterans' Appeals involve claims for an increased disability rating. Moreover, this information discloses that 41 percent of the veterans' benefits cases concern the question of whether an injury is service-related, which is as much of an "all or nothing" issue as whether an injury prevents any gainful employment. Thus, we believe that our previously furnished caseload and costs estimates are reasonable projections of the significant effect S. 349 will have on the Department of Justice.

We are also concerned that the attorney's fees provisions in section 401 of S. 349 do not clearly indicate the situations in which a court is empowered to award attorney's fees against the United States. We understand that the drafters of S. 349 intended attorney's fees to be awarded against the United States only "as an extraordinary remedy." 38 U.S.C. § 3404(i) (proposed language). Nonetheless, other sections of S. 349 could be read to provide for the award of attorney's fees against the United States. Specifically, the proposed language of 38 U.S.C. § 3404(d) provides that, in an action resolved "in a manner favorable to a claimant," the court "may determine and approve" attorney's fees "as part of its judgment." This language suggests that the attorney's fees will be incorporated into the judgment and be paid by the party paying the judgment, the United States. To remove this ambiguity, if the Committee decides to report out S. 349, we recommend that the proposed language of 38 U.S.C. § 3404(d) be amended to provide:

"If, in an action brought under section 4025 of this title, the matter is resolved in a manner favorable to a claimant who was represented by an attorney, the court may determine a reasonable fee to be paid to the attorney by the claimant for representation in the action."

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

ROBERT A. McCONNELL,
Assistant Attorney General.

Senator RANDOLPH. Mr. Chairman——

Chairman SIMPSON [interrupting]. We have a full list——

Senator RANDOLPH [continuing]. Before the witnesses begin, and only because of another commitment that I must meet, could I ask you one or two questions?

Chairman SIMPSON. I have concluded my remarks, Jennings. You may go right ahead.

Senator CRANSTON. I would like to do the same, after he is done; and ask a few questions.

Senator RANDOLPH. I will be very, very brief, and I will defer to you.

Senator CRANSTON. No; go ahead, Jennings.

Chairman SIMPSON. Shall we take the testimony of Mr. Coy for 5 minutes, and then questions? Or do you just wish to ask questions before the testimony begins?

Senator CRANSTON. Can we do it before the testimony begins?

Chairman SIMPSON. If you wish to do that, you may do that.

Senator RANDOLPH. Yes; I regret that I cannot be here for the testimony and you would understand that I have, with you, Mr. Chairman and Senator Cranston, former chairman, an interest in this legislation.

I did not cosponsor it. I had the opportunity to do so, but there were reasons, which I will not go into at this time why I did not do that. But I did support it.

And I am only asking that the record reflect that the Senate has passed this measure in the past. No action has been taken in the House. Is there anyone within the room or the committee, the staff, that can tell me what the situation was in the House in reference to this legislation in the last Congress?

Chairman SIMPSON. Bill Brew, Jennings.

Senator RANDOLPH. Thank you.

Mr. BREW. Senator, the only hearing held in the House was at the end of the last Congress, and it was not a hearing on the legislation, but, rather, an oversight hearing on the issues of judicial review.

At that point the Congress adjourned and they didn't take any action.

Senator RANDOLPH. Then we do not know the attitude of House members, and that is what I was attempting to determine, as to whether there was consideration of a possible hearing process.

Mr. BREW. There was a beginning interest of some of the members, but I don't think there was interest on the committee to actually enact the legislation.

Senator RANDOLPH. Now does our colleague, Senator Hart, continue the active interest with you or Alan in this matter?

Senator CRANSTON. I beg your pardon?

Senator RANDOLPH. Does Senator Hart, who is not present, and I saw him listed as a witness, does he continue an active intense interest in the subject?

Senator CRANSTON. Very much so; very much so.

Senator RANDOLPH. That is all, Mr. Chairman. Thank you.

Chairman SIMPSON. Thank you very much, Jennings, and now if you wish to proceed with questions, do so.

Senator CRANSTON. I would like to very much. I appreciate that. On page 4 and 5 of your statement and under our procedures, although you aren't verbally giving it now we have already read your prepared statement, you mentioned the VA continues,

... to believe that there should be access to the courts for challenges to the constitutionality of veterans' benefits legislation, regulations, and procedures.

You also state:

Clearly, determinations as to ... statutory interpretation are uniquely within the power and expertise of the judiciary.

And that you are aware of,

... an emerging trend ... toward permitting judicial review of allegations that a regulation was promulgated in excess of the Administrator's authority or is otherwise contrary to law.

Without debating the point whether this growing body of case law is a sufficiently reliable basis for the court review of agency action, would the VA oppose legislation that would codify, in title 38, this degree of access to court?

TESTIMONY OF ROBERT E. COY, ACTING GENERAL COUNSEL, VETERANS' ADMINISTRATION, ACCOMPANIED BY SYDNEY J. SHUMAN, CHAIRMAN, BOARD OF VETERANS' APPEALS, AND EDWARD J. LUKEY, DEPUTY ASSISTANT GENERAL COUNSEL

Mr. Coy. That's kind of a tough question to start off with. I might say that I think most of us agree on the objective of this bill. Most of us want to be sure that veterans are treated fairly and are provided due process.

I think it is a question of how you obtain that. Now if, in fact, you could clearly define legislation which would spell out the ability that I think the courts now have, but in such a way that veterans would know what they could challenge and what they could not challenge—it would be a clarifying amendment—and spell out that the authority of the court is limited to a review of constitutional matters, to the issuance of regulations, to the procedures that are adopted by the VA to implement the law, then I think that there are a lot of us that personally would see merit to that.

However, I believe there would be a lot of difficulty in trying to define such a bill. For example, how do you decide where such a challenge departs from the legal issue and gets into the facts of the issues.

Senator CRANSTON. Thanks very much. In light of the VA's apparent acceptance of this growing body of case law, why has not the VA adopted a formal litigation policy not to raise section 211(A) as a bar to jurisdiction with respect to challenges to the constitutionality of legislation, regulations, or procedures, and to the validity of regulations on the grounds of being contrary to applicable law?

Mr. Coy. This trend has been, as you have indicated, emerging. I think we are rapidly reaching the point in time when we do have to evaluate whether or not it is desirable to continue to raise that as a defense in those type of cases.

There have been a few cases in the past where I, personally, feel the issue should not have been raised. And I would say to you,

Senator, that it may be time for us to decide whether or not we should raise this type of a challenge.

Senator CRANSTON. Well, would you please reexamine this question expeditiously and report back to us?

Mr. COY. I would be happy to.

Senator CRANSTON. Thank you.

[Subsequently, the Veterans' Administration submitted the following information:]

I have instructed the Assistant General Counsels to discuss with their staffs the current state of the case law interpreting section 211(a), and to ensure that litigation papers, including reports on cases to the Department of Justice and briefs and other legal memoranda drafted in litigation, be reviewed for inappropriate use of section 211(a). Specifically, I have asked that the section not be raised in response to a clear allegation that a statute, regulation, or procedure is unconstitutional, or that a regulation or procedure exceeds the statutory authority of the Administrator. Any questions about implementing this policy, either in interpreting what VA policies and practices fall into the categories enunciated above or in the "gray areas" of VA administrative issuances not clearly identifiable as binding regulations or procedures, should be discussed with the General Counsel or Deputy General Counsel. See *Carter v. Cleveland*, 643 F.2d 1 (D.C. Cir. 1980).

I have not attempted to prevent a responsive pleading to a complaint which purports to be a constitutional challenge, but in reality, upon a fair reading of the allegations, is a deliberate effort to avoid section 211(a) in a challenge to an individual benefits decision. See *Anderson v. Veterans Administration*, 559 F.2d 935 (5th Cir. 1977). We also will continue to raise section 211(a) as relevant to certain issues in a complaint which challenges the validity of a statute, regulation, or procedure. For example, we may argue that, even if a court should take jurisdiction over a challenge to a regulation applied in an individual benefits decision by the VA, the court should limit itself to considering that legal issue, and then remand the case to the VA to reconsider its benefits decision. In other words, section 211(a) would, in our view, operate to prevent the court from readjudicating the VA benefits decision even if it finds the applicable regulation invalid. We would expect to review this policy on occasion as case law develops. We also might predict unforeseeable questions on types of cases we have not described here. When these occur, we will attempt to apply the principles we have set forth to determine whether section 211(a) properly should be raised.

Senator CRANSTON. Do you believe this emerging body of law, particularly in cases involving challenges to regulations, provides the basis for a court to review a case involving an individual claim for benefits when the challenge is to the validity of a regulation and the claimant has pursued the case through the BVA?

Mr. COY. I think that the court in those cases should, and in most cases does, look at the issue of law involved, and then remand it back for a determination of the factual aspects, consistent with their interpretation of the law.

Senator RANDOLPH. Alan, can I—

Senator CRANSTON. Yes; can I ask for a followup first just on that one? Do you believe, then—apparently you do believe that such judicial review should be available?

Mr. COY. I believe that judicial review ought to be available and is, in fact, available for constitutional challenges and challenges of regulations and procedures.

Now as I indicated earlier—

Senator CRANSTON. Even in individual cases?

Mr. COY. I would say that if the issue in the individual case is the constitutionality of a regulation, then, yes, it should be able to be challenged. And, in fact, I think is able to be challenged.

Senator CRANSTON. Or the validity of the regulation?

Mr. COY. Yes.

Senator CRANSTON. Excuse me, Jennings.

Senator RANDOLPH. I want a clear discussion, for a moment, of what you mean by regulation or regulations.

Mr. COY. The Veterans' Administration is handed by the Congress a piece of legislation and then is asked to implement it.

What we try to do is implement it by the issuance of regulations, so that the veterans and those associated with the veterans know how that law is being interpreted and how it is being administered.

There are formal regulations which are substantive in nature, and then there are procedural-type instructions which are usually in the form of manuals or procedural guides.

I happen to believe that even a procedure challenge probably is acceptable and is now, in fact, being reviewed by the courts.

Senator RANDOLPH. Well, then, you are saying, in effect, that you try to carry the law that comes from the Congress, to take the intent as well as the letter of the law in fashioning regulations; is that correct?

Mr. COY. Yes, sir, it is.

Senator RANDOLPH. Thank you.

Senator CRANSTON. In a case involving an individual claim for benefits where the challenge is to the validity of a regulation, do you believe that limitation on attorneys' fees in section 3404(c) of title 38 would be applicable?

Mr. COY. I think it generally has been determined to be applicable; yes. Whether or not it should be modified in cases where there is judicial review of regulations, I think is a reasonable issue that ought to be given more thought.

Senator CRANSTON. Would you take a look, then, at the issue; and how a claimant would be able to secure the assistance of an attorney in such a case?

Mr. COY. I'll be happy to.

[Subsequently, the Veterans' Administration submitted the following information:]

The cases we have cited in our report on S. 349 as clearly allowing courts to take jurisdiction in civil actions challenging statutes and regulations do not deal with the question of whether attorney fees are payable. Without attempting to list cases, it has been our experience that a number of these challenges by individual benefit claimants have been made with the assistance of "legal aid" attorneys, who do not charge a fee for their services. Others were brought by education institutions rather than by individual claimants, so that section 3404(c) did not appear to be applicable.

Although we have found no case law to support our position, we think subsection 3404(c) is applicable whenever the nexus of the complaint is a claim for benefits. Aside from civil actions brought by such non-claimant parties as educational institutions, a plaintiff successfully challenging a regulation would generally have to be a claimant in order to have standing to sue. Whether or not such a claimant frames his complaint only to challenge the validity of a regulation, for example, or includes allegations that VA incorrectly applied the law to his or her particular claim, it would seem that the complaint could be described as arising from "... claims for monetary benefits under laws administered by the Veterans' Administration," and therefore would be included in the limitation of section 3404(c).

If our interpretation is incorrect, and subsequent decisions holding a VA regulation invalid also hold that the limitation on attorney fees is inapplicable, a new statute may provide attorney fees as part of costs awarded to a prevailing party. Effective October 1, 1981, the "Equal Access to Justice Act," amending 28 U.S.C. § 2412, will allow payment of attorney fees by the United States to a litigant who prevails in an action against the United States, except where other more specific fee statutes are applicable or the court finds the position of the United States was substantially justified. Public Law No. 96-481, § 206, 94 Stat. 2325.

Senator CRANSTON. Well, on page 5 of your statement you speak of opposing judicial review of, "individual benefit decisions."

I am not clear as to the extent of your opposition and the basis for it.

Mr. COY. I think that what we have tried to spell out in the statement and also in the report is that we believe that the adjudicative procedures that are followed are extremely informal, but that, more important, those who are pursuing their claims are adequately represented in the vast, vast, vast majority of occasions by representatives of veterans' organizations who I think are far more knowledgeable on these issues in most instances than lawyers.

We think that the procedures that are followed are acceptable. And we see nothing to be gained in those cases by a judicial review which will be costly and time delaying.

Senator CRANSTON. First, you indicated in response to a prior question that you thought it was appropriate that in an individual benefits case for a court to review the question of the agency's authority to promulgate a particular regulation; is that correct?

Mr. COY. I think that courts now, in fact, are doing that, and have done that very recently in the *Kirkhuff* case. I think what the court should do in that case, and what they are doing, is to look at the legal issue involved associated with the challenge to the regulation or the law involved, and remand the factual issue back to the agency for proper determination.

Senator CRANSTON. You think it is appropriate for the courts to do it?

Mr. COY. Oh, I think it is appropriate, and I think they are doing it.

Senator CRANSTON. Next, what about questions of law, such as the challenge to the interpretation or application of a particular statute or regulation in an individual benefits case?

Mr. COY. The courts are now reviewing those cases.

Senator CRANSTON. So regarding factual questions, isn't what you are saying that the BVA should be free to make arbitrary and capricious decisions on the facts?

Mr. COY. Well, that is kind of like asking me when am I going to stop beating my wife.

Senator CRANSTON. That seems to be the conclusion.

Mr. COY. I don't think that is fair, and I don't think they are making those kind of decisions.

Senator CRANSTON. Well, you didn't say they are, but they would be free to.

Mr. COY. I don't think anybody ought to be free to make those kinds of decisions, and if they make them we ought to replace the chairman, if they make them too often.

Senator CRANSTON. Well, how do we prevent it?

Mr. COY. Well, we can replace him if they make them too often. [Laughter.]

Senator CRANSTON. Well, once is too much for an individual veteran who is subject to such a decision.

Mr. COY. Yes. Unfortunately, we live in a country where everybody makes mistakes, including the courts. And you can't prevent a court from making an arbitrary and capricious decision.

And I happen to personally believe that some have been made. Yet I think they try very hard, and I think the Board tries very hard. And I think that, as the chairman in his opening statement indicated, the Board of Veterans' Appeals does a good job, a fair job, and an honest job of adjudicating these cases.

I don't believe that they have a right to be arbitrary and capricious, nor do I think that they are being.

Senator CRANSTON. The fact would remain that as a result of the position that you are presently taking they are free to do it.

I believe that you are familiar with the *DeMagno* case. Do you believe that had the Court of Appeals not been able to find the highly unusual jurisdictional basis it found there for its review of the facts, that the case should have gone unreviewed and uncorrected by a court of law?

Mr. COY. I think that if there is such a thing as a "mistake," which I said earlier they don't make, that was one. I'll let Mr. Shuman talk about that case. I think that was, in fact, a bad decision.

But I will let him talk about it.

Senator CRANSTON. Well, the issue was, should it have gone unreviewed and uncorrected by a court of law if this way of resolving it had not been developed?

Mr. COY. I think that it should not have happened in the first place. But, Senator, I believe you have to evaluate the issues on balance. You have to look at the entire spectrum of what we are doing, and judge us on balance, rather than on individual case.

Because here is a case where we are talking about spending major amounts of money to administer a new law in which I think the benefits are very limited.

And I think that in this day and age we have to do that type of evaluative process in all kind of cases.

Senator CRANSTON. On page 8 of your statement you cite the recent case of *Kirkhuff v. Cleland*. Without regard to the merits of the veteran's claim in that particular case—I understand that the agency opposes the court's decision on the merit—it seems to me that you cited the case with approval as an example of the emerging case law in which courts are not allowing section 211(a) to bar their taking jurisdiction of cases involving challenges to regulations.

Can you tell me why, then, in your recommendation to the Justice Department with respect to the case, at both the trial and appellate court levels, the agency raised the section 211(a) bar in an attempt to defeat jurisdiction?

Mr. COY. Well, I can try to tell you. That case has been pending for some 2½ years. There has been an evolution of cases during that period of time.

In defending a case it is a normal practice for most attorneys, I think, to raise as many issues as they can.

And here was a case where we believed the regulation was defensible, and the issue of section 211 was raised in the defense, along with other defenses.

I guess I think, in hindsight, it should not have been raised. I think that the district court, very correctly, indicated that they did

have jurisdiction. And there is no question in my mind that the District of Columbia Circuit Court will say they have jurisdiction.

Senator CRANSTON. Thank you very much. That completes my questioning. I did want to say one thing before I take off for awhile.

You, Bob, have been a very great friend of the committee and the veterans, generally, in our country. I want you to know that we recognize the difficult circumstances under which you are testifying this morning, and know you will do a fine job representing the administration, as you have in the past on behalf of predecessor administrations, both Republican and Democratic.

I think your work at the VA illustrates the very high level of dedication and commitment that so many career Federal employees bring to their jobs which so often is overlooked in these days when it is fashionable to disparage Federal workers.

Finally, I want to express my admiration and appreciation for the fine work you did last week in assisting the new Administrator in answering so promptly the written questions I posed to him in connection with the confirmation process.

Your efforts were indispensable to the goal we shared of getting him confirmed very swiftly. And I appreciate your help in that respect.

Mr. COY. Thank you, and I enjoy working with you and your staff. Sometimes I enjoy it more than others, but I always enjoy it. [Laughter.]

Senator CRANSTON. Thank you very much. Alan, thank you for letting me proceed in that way.

Chairman SIMPSON. Thank you, Al. And I certainly echo your comments about Bob Coy. I have not had the opportunity to get to know him and work with him as you have but he has been more than helpful to this newer member of the body. Your work the other day, Bob, indeed, enabled us to proceed with the confirmation in a very timely way and that was very much appreciated, not only by Senator Cranston, but by me. Your work enabled the Senate to act on the nomination on Friday afternoon. Certainly we were prepared to go until Monday or Tuesday, but you were most helpful and we were able to act sooner.

Mr. COY. Thank you, Mr. Chairman.

Chairman SIMPSON. Now, at this point, we have not had the testimony, the 5 minutes of testimony, but I now would recognize you, Arlen. Do you have an opening statement?

And if you have a time problem, some questions you wish to direct, we will go again through this novel procedure of when the witness does not testify, he just gets questions.

Senator SPECTER. Mr. Chairman, I do have a time problem and I would appreciate an opportunity to comment for a minute or two, and then ask some questions. I wanted to report to the committee, albeit briefly at this moment, about hearings which were held in Philadelphia with the authorization of the chairman of the committee, to whom I have spoken privately, concerning the issue of agent orange.

And I shall not make an extensive report now, because of the time problems, except to say that there is great interest among the

veterans in eastern Pennsylvania. They appreciated an opportunity to be heard.

And there is tremendous concern, which I know this committee will address further. On the subject at hand, a judicial review, my known inclinations are to support the legislation, although I intend to study it in some detail, because I was not in the Senate when the matter was considered in the last session.

I do have just one question, which I would like to pose, because it is very much on my mind, and on the minds of many others arising from the hearings in Philadelphia relating to agent orange.

And I have begun to ask the question informally just before the hearings opened, and with the permission of the chairman, I would like to ask that one question at this time.

Chairman SIMPSON. Please do so.

Senator SPECTER. And that is, what is the standard of proof which is applied in a decision as to whether there is a causal connection between access or exposure to agent orange and compensation by the Veterans' Administration?

Mr. COV. Before answering that, I would like to say one comment. I share your concern about the whole issue of agent orange.

I recently spent 11 days and nights with the hunger strikers in Wadsworth, and I have to admit that I came away from that experience a softer person. I realize there is a lot of deep concern and fear, with respect to this issue because a lot of the questions are not able to be answered.

And I would hope and pray that we can find ways to answer those questions soon. And some of the things we are doing now in the forms of research and others can respond to those concerns.

The problem we have had, and that kind of leads into the answer—the problem we have had is the extreme difficulty that the scientists apparently have—and I am not a scientist—in trying to determine the causal relationship of exposure, where that exposure might have occurred.

And that is another problem. Two, some of the concerns that veterans are now having, and some of the complaints they are now having may be mixed up between issues associated with delayed stress.

Yet, they are real; and they are important. Now, to answer the legal question—our regulation says the claimant is required to submit evidence sufficient to justify a belief in a fair and impartial mind that his claim is well grounded.

Now I would hope that I am fair and impartial. Yet I, personally, don't know what type of evidence is available. I have talked to scientists and I sat in and participated with the Interagency Work Group.

I have talked to our own people who are working on this issue, and I have heard of some results of the Swedish and German studies.

And, as I said, I hope I am fair and impartial. Yet, I don't know how I could adjudicate a case with what the scientists have told me, except where the issue is related to a skin condition, for example, chloracne.

And that is the problem we are having in that case. The burden of proof, if it is a problem, is associated with the great difficulty

that the scientists, the scientific community, seems to be having in saying that certain of these symptoms are associated with agent orange.

While I have heard that certain Swedish tests indicate the possibility of some association between dioxin and soft tissue sarcoma, I've heard of no scientific support for the other things.

And that is where the problem is.

Senator SPECTER. Well, the difficulty, from what I have seen, Mr. Coy, in the position which you expressed is the great divergence between the quantum of proof that appears to be required by the Veterans' Administration and that which a claimant need show in a court of law in accordance with our regular standards.

If there is a claim about medical causation in our courts, one party against another, absent the U.S. Government being involved, the jurisdictional issues, the requirement is simply that an expert testify.

And, customarily, a medical doctor is sufficient to be an expert on a wide variety of subjects, whether or not he really has the expertise or not for raising fact questions for a jury, which then returns a verdict.

And the situation that I see here is that when you say it has to be well founded and the scientific community has not reached agreement, then you are setting a much more difficult burden of proof than exists anyplace else on the issue of establishing a medical causation.

And when I heard the testimony, Mr. Chairman, about the virtual practice here at this time, that the sequence of tests under a year and a half, some longer, and some ranging on stage 3 in some of the testing for 10 to 15 years before the Veterans' Administration may come to a view as to what is scientifically establishable, it just seems to me that there is too much disparity between that burden of proof, quantum of proof and what exists in the rest of the legal world on establishing medical causation.

Mr. Coy. Well, you know, everybody has a right to their own view on this thing. My view is that the courts try to be fair and openminded.

And I think that's what we try to be. I am not convinced that a court or even a jury, if they looked at the scientific evidence, or if they looked at medical opinions, could at this point in time reach a conclusion on anything other than emotion.

I hope and pray that it is not 15 years. I think if it takes 15 years to answer this question, it is totally inexcusable. The comments I have heard would indicate that the ranch hand study is well under way, and that some definitive decisions with respect to mortality will come out within 1 year, and with respect to morbidity within 2 years.

The long-range genetics results may take longer. Apparently, the genetic issues are the long-range issues that are going to take awhile.

But some of the studies with respect to some of the other conditions or other complaints you are hearing I don't think are going to take that long. It is a tough issue, and it is an issue which has a lot of emotion.

And I guess I have it, too.

Senator SPECTER. Thank you, Mr. Coy. Thank you, Mr. Chairman. I had a great deal of followup, but I shall not pursue it now. There will be another more appropriate occasion.

Thank you.

Chairman SIMPSON. I know there will be. I do appreciate your work on the Veterans' Affairs Committee, and I am pleased to have had your informal report on the hearing.

Perhaps you would like to furnish it in a more formal way, and, if so, I will certainly provide it to the members of the committee. I think it is important to share what you have with us.

The agent orange issue is a tough one. It has been that way since I got here, and it is charged with emotional aspects that defy reason.

I practiced law, not in high-powered circles of Philadelphia, but I surely remember the difficulties of causation and medical testimony. It is tough enough with a physical injury. It is so much tougher when you are dealing also with psychological injury. And I think that's where we are because, unfortunately, as I see it, there are many people 30 to 35 years old in the United States, men and women, who suffer the symptoms of hypertension, hyperactivity, hyperventilation, anxiety, depression, dizziness, tingling of the arms.

All the things that go with agent orange. But all the things, too, that go with life. And whether they are involved in the midst of a divorce can sometimes give those rather remarkable conditions.

Or whether their son got busted for pot. You know, I practiced law too long not to see those things. And so our difficulty is trying to tie it back to agent orange, and that's tough; that's really tough.

I can only pledge to you that I will try to do it in an arena which is free of the emotional quick fix, because it's so easy. I mean you can get called a real bunch of names for not responding to it.

But it deserves our attention, and if it is going to take 15 years, then somebody has really dropped the ball.

But surely the study and the UCLA reputation for their skills should give us something. I just want you to know I am pledged to doing something about it, and not just talking about it.

But I won't be calling a press conference just to get people souped up about it. I hope that I will have something to say when we get to that point.

Thank you. Frank, do you have a statement you would wish to make?

Senator MURKOWSKI. Well, in the interest of time. Mr. Chairman, I had a prepared statement, but most of it has been expressed in one way or another. I guess, in summary, while I am concerned about the fairness of the adjudication as it is determined on the level of the Veterans' Administration, through the administrative functions, I am also concerned about the potential time delays that might be involved in the Federal courts in adjudicating claims as well.

So rather than pursue opening remarks, I think it would be more appropriate, Mr. Chairman, to proceed with the testimony, and perhaps that will formulate my ideas even faster than generalizing here.

Chairman SIMPSON. OK. Frank. Then we can come back to your questions. I was just thinking, I might get to enjoy this format, where you just come on, we get to fire away, and you don't get to say anything, you see? [Laughter.]

So if you will proceed, Bob. I want to note that Gary Hart was unable to be here. He is very deeply committed to the legislation.

His statement will be placed in the record at this point.

[The prepared statement of Hon. Gary Hart, a U.S. Senator from the State of Colorado, follows:]

PREPARED STATEMENT OF HON. GARY HART, A U.S. SENATOR FROM THE STATE OF COLORADO

Mr. Chairman, I would like to thank the distinguished Senator from Wyoming and the other members of this Committee for the opportunity to testify here this morning on an issue about which I feel very strongly: Judicial review of the Veterans' Administration benefit decisions and essential improvements in the administrative procedures of the VA.

During the 96th Congress, the Senate passed this legislation. Unfortunately, the House Committee on Veterans' Affairs took no legislative action on the measure until late in the 96th Congress when 2 days of hearings were held by a nonlegislative subcommittee. The House Committee on Veterans' Affairs did not have an opportunity to report out the bill in the 96th Congress.

Mr. Chairman, I first introduced legislation to open the Veterans' Administration to judicial review in May of 1976. Since that time I have persisted in my efforts to ensure that the American veteran be afforded all his or her constitutional rights to the due process of law in dealings with the Veterans' Administration.

Senator Cranston, the former Chairman of this Committee, has strongly supported this effort. Through his commitment and the support and work of other distinguished members of the Committee, like yourself, a clear and well documented case for reform of the Veterans' Administration procedures is now before this Committee. Since I first introduced a bill to reform the procedures within the Veterans' Administration nearly 5 years ago, this Committee has conducted seven hearings on the concept of judicial review of VA decisions. Legal scholars, veteran organizations, the Veterans' Administration, the Department of Justice and individual veterans have all provided this Committee with a wealth of substantive evidence that points to only one logical conclusion . . . the enactment of S. 349 into law.

Mr. Chairman, the intent of S. 349 is to establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans' Administration, to apply certain provisions of the Administrative Procedures Act to the rulemaking procedures of the VA, to provide for judicial review of certain final decisions of the Administrator of Veterans' Affairs and to provide for payment of reasonable fees to attorneys for rendering legal services to individuals claiming benefits under laws administered by the VA.

Mr. Chairman, when I first introduced legislation to provide for judicial review of final VA determinations in the 94th Congress, it was at the urging of Colorado veterans who felt that the denial of that right relegates veterans to the status of second-class citizens. The veterans of Colorado could not understand why they were denied the right to court review of their claims, if denied by the VA, when almost every other Federal bureaucratic action affecting any corporation, welfare recipients, Social Security recipients and prisoners is afforded judicial review by the Federal courts.

Mr. Chairman, the central issue in the debate on this legislation is whether we are going to afford the American veteran the same constitutional rights we grant other citizens in this country. Judicial review is important in granting the veteran adequate protection of his rights as a citizen, and it will provide improved oversight of VA procedures and activities by an independent body.

It is important to note that S. 349 will not diminish in any way the important role played by the veterans organizations in their efforts to assist claimants before the VA. The veterans service officer program, which presently provides highly effective, free service to veterans, will continue assisting veterans in the filing of claims with the agency.

The \$10 limitation for payments of attorneys who represent veterans in making original claims before the local VA rating board will be retained. Clearly, veterans will continue to use the services provided by the national veterans service officers or VA benefit counselors in the initial stages of the VA claim procedures. If the

veterans' claim is rejected, he may want to secure the services of an attorney to develop evidence and to make legal arguments for an appeal to the case by the Board of Veterans Appeals.

To protect the veteran, a provision of the bill will permit a claimant and his attorney to agree to a fee not to exceed \$500. As an additional protection, all fee payments will be subject to the approval of the Administrator of Veterans' Affairs who could also approve a higher fee in extraordinary cases requiring unusual preparation of specialized skills. Attorneys who represent veterans in proceedings before the courts would be paid a reasonable fee as determined by the court or on a contingency basis, not to exceed 25 percent of the total amount of any past-due benefits awarded on the basis of the claim.

In recent years, the Federal courts have been moving in the direction of expanding their jurisdiction over VA actions which were formerly precluded from judicial review. For example, in *Johnson vs. Robison*, the Supreme Court held that section 211(a), title 38, United States Code (precluding judicial review) cannot be construed to deny justice to those who challenge the constitutionality of statutes providing veteran benefits. (415 U.S. 261:1974).

In the case of *Plato vs. Roudebush*, the court determined that section 211(a) does not preclude judicial review of VA procedures in instances where VA pensions terminated by the agency without a pretermination hearing (397 F. Supp. 1295; D. Md., 1975). The Department of Justice did not appeal this decision by the Federal District Court for the District of Maryland.

In the case of *Wayne State University vs. Max Cleland, et al.*, the Sixth Circuit Court of Appeals held that section 211(a) is not a bar to judicial review of the constitutionality of rules, and regulations promulgated by the Administrator of Veterans' Affairs or his authority to promulgate regulations (Nos. 78-1141, 78-1142; D. Mich., 1978). In recent years, the right to court review of VA rules and regulations has been upheld in *Merger Area X vs. Cleland* (604 F. 2nd 1075 (8th Cir. 1979)) and *Evergreen State College vs. Cleland* (621 F. 2nd 1002 (9th Cir. 1980)).

Mr. Chairman, the trend of the Federal judiciary in a number of key decisions is clearly toward more protection of the due process rights of veterans. It is the responsibility of Congress to take action now to restructure the current VA adjudication procedures as outlined in S. 349, not only to ensure that veterans' rights are protected in the process but also to protect the agency from the potential of court imposed reforms that may overburden the agency with additional procedures.

Mr. Chairman, S. 349 will bring the Veterans' Administration's procedures in compliance with the recent Federal court decisions mentioned, and will grant our veterans, many of whom feel betrayed, their full measure of constitutional rights for which they served this nation.

As I have stated many times, the fundamental issue in this legislation is simple justice for our veterans. To deny any citizen access to an attorney, to isolate a Federal agency from judicial review and deny judicial oversight of rules and regulations promulgated by a Federal agency goes against the very principles of our constitutional system.

Again, I appreciate the opportunity to present this testimony and I commend the professional Committee staff for their excellent work on this measure.

Chairman SIMPSON. If you will present your testimony in two phases: First, Bob Coy, as the Acting General Counsel, make a presentation on S. 349, and then the committee will hear from the Chairman of the Board of Veterans' Appeals, Syd Shuman, and his presentation of the Board of Veterans' Appeals' issues.

Again, followed by questions, and so on. For the record, you might introduce those at the witness table and then proceed with your remarks, which must necessarily be limited to 5 minutes, if you would, Bob.

Mr. Coy. Mr. Chairman, I might say that this approach is kind of novel, but I kind of like it. You know, you start out at these hearings a little tight, but this loosens you up fast. [Laughter.]

Chairman SIMPSON. It certainly does.

**TESTIMONY OF ROBERT E. COY, ACTING GENERAL COUNSEL,
VETERANS' ADMINISTRATION, ACCOMPANIED BY SYDNEY J.
SHUMAN, CHAIRMAN, BOARD OF VETERANS' APPEALS, AND
EDWARD J. LUKEY, DEPUTY ASSISTANT GENERAL COUN-
SEL—Resumed**

Mr. Coy. I would be happy to introduce, on my left, Mr. Sydney Shuman, who is the Chairman of the Board of Veterans' Appeals, and on my right, Mr. Ed Lukey, who is the Deputy Assistant General Counsel in the Office of the General Counsel, dealing primarily with matters of judicial review.

And I am going to summarize most of this, because a lot of the issues that we attempted to address in the statement we have actually covered in the questions and answers.

Basically, the bill, S. 349, contemplates four major changes in present law concerning claims involving benefits administered by the Veterans' Administration. First, it would codify, with some changes, the internal adjudication procedures now used by the agency. Second, it would subject VA rulemaking to certain provisions of the Administrative Procedures Act, involving requirements for notice and opportunity for comment. Third, the bill would provide access to the courts to claimants who are dissatisfied with VA benefit decisions and eliminate the operation of title 38, United States Code, section 211(a), as a bar to any civil action otherwise authorized by law. And, finally, the legislation would substantially revise the current \$10 statutory limitation on the attorney fees.

My prepared statement went into the historical background of the position that the agency has taken. Up until 1977 we were in substantial agreement with the longstanding congressional policy to preclude judicial review.

In 1977 there was a modification of that position, primarily because we saw where the courts were going. And we, therefore, took the position that we had no problem and actually favored modifying 211 to provide veterans with access to the Federal courts to resolve any constitutional questions arising from the administration of VA programs.

We also indicated with some lesser degree of support that we were no longer opposed to a limited judicial review of individual benefit decisions not involving constitutional questions.

We have, Mr. Chairman, reassessed this position. We have tried to look at the whole balancing process. We have tried to assure, on the one hand, that veterans, their dependents, and their survivors receive constitutional due process protections.

Yet, on the other hand, we don't believe the administration of veterans' benefits should be overly burdensome upon either our claimants or the Government.

In the context of the economic program of the present administration, we believe that any proposed legislation which would generate additional expenditures of Government funds by increasing the staff of the VA and causing additional administrative burden upon the agency should be reexamined with great circumspection.

Only if there is demonstrated a clear need which justifies the new expense will we support such new legislation.

We believe the adjudication process that we now have is a balance, it's informal, it's nonadversarial. And we think that, essentially, due process is provided.

Veterans do have a right to appeal, *de novo*, before the Board of Veterans' Appeals. Accordingly, we conclude that legislation, such as S. 349, providing for court review of individual benefit determinations is neither necessary nor advisable.

Now, as I have indicated earlier, we believe—and Mr. Nimmo so testified several days ago—that veterans should have the right to challenge the constitutionality of legislation, regulations, and procedures.

We took this position based, primarily, on the trend of cases since the *Robison* case in 1974.

We do not believe that the VA should be above the law.

We believe that veterans should have the benefit of the law. In fact, we believe they now receive the benefit of the law. They have the right now to challenge the constitutional issues, and to have our regulations and procedures reviewed by the courts.

And I think they should have that right. Our concern has to do more directly with whether the parameters of that review should be designed by the courts, with the courts deciding exactly the areas that the Constitution authorizes their challenges, or whether some attempt should be made to spell it out in statutory form.

And as I indicated earlier, that is where the great difficulty arises: To try to define it in such a way that it does not, again, limit some of the areas that the courts would otherwise take a look at, and still not get into the factual issues, which we believe ought to be resolved on the administrative level by our own adjudication procedures and the Board of Veterans' Appeals.

It is for that reason that we have modified the position we took last year. We have not modified our objective.

We believe regulations and procedures should be able to be challenged. Our only difference is that we believe that such a review is now available through the courts, and any attempt to define it by statute is not necessary.

We do not favor, as I indicated, a judicial review of individual benefit claims, particularly those dealing with factual issues. We believe that the process we are now following is fair, and affords due process.

I'm trying to summarize through this. Claimants are now, we believe, adequately represented by the veterans' organizations. I was talking to Mr. Brew earlier, and I like to catch him off balance once in awhile, because he always tries to catch me off balance.

And we discussed the issue of attorney fees and lawyers involvements, I made the comment—and I am a lawyer—that I think the good Lord made brains before he made lawyers, and I didn't think that all the brains were necessarily given to lawyers, although I think lawyers do a good job.

I also think that representatives of veterans' organizations are much more knowledgeable in many instances—in most instances—than would be an attorney, that would handle this type of case.

It's very specialized; they're very knowledgeable. And I think they represent veterans well. That's one of the reasons that we

don't believe that due process requires that a veteran have access to a court in order to get fairness.

Now the problem in this case, as our report indicates, is the extreme administrative costs that would be associated with proceeding to courts on this type of case.

We have made some estimates, and our report indicates a basic opinion that the administrative costs, just within the VA, not including the courts, not including additional judges, not including the people in the Department of Justice, the administrative costs would be something in excess of \$9 million a year.

The direct claim cost would be less than one-third of that, or less than \$3 million. I think it is entirely possible that a court would disagree if they were to review it, with some of the factual determinations we now make.

I think these disagreements would, however, be very limited. The various costs, the delays, the clogging of the courts and other things that would arise are such that judicial review of individual-fact cases is, in our opinion, not warranted and not necessary.

Now our statement basically talked about the judicial review issues. There are several other provisions in the bill which I would like to comment on just briefly in about the next 1 minute.

One of the sections of the bill would mandate by statute certain of the adjudication procedures that we are now following.

We issue our own implementing procedures, and one of the provisions of the bill would, in fact, put that in statute. We think that is unnecessary, and probably unwise.

With regard to the provision involving the issuing of notice of new regulations, and offering the opportunity to comment consistent with certain sections of the APA, is something we now do voluntarily.

We would, therefore, have no objection, if that provision was put into law. Yet, I don't think it's necessary, but we have no problem if that provision was to be put into law.

With regard to attorneys' fees, there again, I think we do have somewhat of a dilemma. We think that under the current circumstances there is not a need for a large involvement of attorneys in the adjudication of claims on the administrative level.

Yet I must acknowledge that if we went to a more elaborate form of statutory judicial review of regulations and constitutional issues, it would seem to me that the whole attorney fee provision would have to be modified to some extent.

We have some problems with some of the ways it is modified, and we would be happy to talk more with the staff on that.

But we acknowledge that if you did get into some form of statutory judicial review, some modification of the attorney fee thing would probably be necessary. The way it stands now, we have not favored that provision, because we have some problems with certain provisions of it.

And, second, we think that in the absence of statutory judicial review, it is not necessary with respect to individual claims. Basically, that summarizes my statement.

The only thing I want to comment on once more is, there is not any disagreement in our objective. We have an obligation to the veterans of this country to be fair.

We cannot be above the law. We need to provide them due process of law. The only way we disagree is in the approach we are following. We now feel that in most instances we are providing that.

We feel, on balance, that this type of elaborate statutory approach to a problem of a few is not warranted in view of the costs and other problems associated therewith.

I would be happy to answer any questions you might have.
Chairman SIMPSON. Thank you, Bob.

[The prepared statement of Robert E. Coy, Acting General Counsel, Veterans' Administration, follows:]

PREPARED STATEMENT OF ROBERT E. COY, ACTING GENERAL COUNSEL, VETERANS'
ADMINISTRATION

Mr. Chairman and Members of the Committee:

I am pleased to be here today to present the views of the Veterans Administration regarding S. 349, 97th Congress, entitled the "Veterans' Administration Adjudication Procedure and Judicial Review Act."

This measure is identical to S. 330, 96th Congress, which passed the Senate on September 17, 1979, and was not acted upon by the House of Representatives. The bill contemplates four major changes in present law concerning claims involving benefits administered by the Veterans Administration. First, the bill would codify, with some changes, the internal adjudication procedures now used by the Agency in making benefit decisions. Second, it would statutorily subject VA rulemaking to the provisions of the Administrative Procedure Act at 5 U.S.C. § 553. Third, the bill would provide access to the courts to claimants who are dissatisfied with VA benefit decisions, and eliminate the operation of 38 U.S.C. § 211(a) as a bar to any civil action otherwise authorized by law. Finally, this legislation would substantially revise the current \$10 statutory limitation on the fee an attorney may receive for representing an individual claimant in prosecuting a claim for veterans' benefits.

2.

Before discussing the various provisions of S. 349, I would like to briefly review the VA's position on the issues it addresses. Many of these issues were discussed during the hearings held by this Committee in the last Congress on S. 330, and in the 95th Congress on S. 364. Such a review may prove helpful, since the Agency's current position on judicial review and related issues differs from that previously expressed with regard to S. 330.

Historically, the Agency has been in agreement with the longstanding congressional policy to preclude judicial review of the decisions of the Administrator. However, on October 7, 1977, in our report to this Committee on S. 364, we suggested that the finality statute, 38 U.S.C. § 211(a), should be amended to provide veterans with access to the Federal courts to resolve any constitutional questions arising from the administration of VA programs. Moreover, we stated that, if Congress deemed it appropriate, we no longer opposed limited judicial review of individual benefit decisions not involving constitutional questions. This neutral position was again expressed in conjunction with S. 330, on which we reported to the Committee on March 21, 1979.

3.

In addition, although we believed then, as we do now, that our current adjudication procedures meet all of the requirements of fundamental fairness and comport with the evolving concept of "due process," we previously suggested that if Congress believes additional procedural requirements at the administrative level are desirable, they should be clearly specified in title 38, and predicated upon conformity with the unique nature and realities of VA functions and procedures. Finally, we stated that we would not object to a modification of the present attorney fee limitation, provided the best interests of veterans and other claimants are protected.

As mentioned above, we have reassessed the desirability and efficacy of the proposed legislation on judicial review of VA benefit decisions. This reevaluation has been undertaken with the goal of assuring, on the one hand, that veterans, their dependents, and their survivors receive constitutional due process protections equivalent to those rights available to other Americans; and, on the other hand, that the administration of veterans' benefits is not overly burdensome upon either our claimants or the Government.

In the context of the economic program of the present Administration, we believe that any proposed legislation which would generate additional expenditures of Government funds, particularly in increasing the staff of the VA and the administrative burden upon the Agency, should be examined

4.

with great circumspection. A further concern, of course, is the cost impact upon the Department of Justice and the Federal courts which would result from judicial review legislation. Only if there is demonstrated a clear need which justifies the new expense, will we support such new legislation.

Our position on S. 349 is one of opposition. It is our considered opinion that, on balance, the informal, non-adversary nature of our claim procedures, combined with our willingness to assist in developing evidence, to provide a personal hearing at virtually any stage of the adjudication process, and to resolve any reasonable doubt in favor of granting benefits, affords our claimants at least a parity of due process with all other citizens. Moreover, the right to appeal and obtain a de novo review by the Board of Veterans Appeals, without the significant costs of litigation, endows a VA claimant with a practical and effective brand of due process which is far less onerous than judicial review would be. Accordingly, we conclude that legislation such as S. 349, providing for court review of individual benefit determinations, is neither necessary nor advisable.

We continue to believe that there should be access to the courts for challenges to the constitutionality of veterans' benefits legislation, regulations, and procedures. This

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notion logically flows from a 1974 decision of the U.S. Supreme Court which held that 38 U.S.C. § 211(a) does not preclude judicial inquiry into whether a statute establishing a veterans' benefit program is constitutional. Clearly, determinations as to constitutionality and statutory interpretation are uniquely within the power and expertise of the judiciary. In addition, we are cognizant of an emerging trend in several Federal district courts and courts of appeals toward permitting judicial review of allegations that a regulation was promulgated in excess of the Administrator's authority or is otherwise contrary to law. This growing body of case law would seem to provide a sufficient basis for review of substantive agency actions of broad, binding application, without the need for new legislation.

As for judicial review of individual benefit decisions, our continuing study of the issue leads us to oppose modification of the present law. The courts have consistently maintained the validity of 38 U.S.C. § 211(a) in its present form, declining to review the technical and complex fact-specific decisions of the VA on individual claims. Moreover, we do not believe the record reveals deficiencies in VA's present handling of individual benefit decisions such as would warrant the imposition of judicial review of such decisions,

6.

or the enactment of the other sweeping changes proposed in S. 349. Because of the problems which we perceive in the bill, as well as the costs which would result, we cannot support its enactment.

In considering the provisions of S. 349, we believe that a brief review of the history of the finality statute, 38 U.S.C. § 211(a), together with an explanation of current VA claims procedures, will be helpful in understanding the issues raised by the proposed legislation.

Judicial Review of Administrator's Decisions

The legislative history and the judicial construction of subsection 211(a) of title 38, United States Code, reflect a continued, longstanding intent by Congress to maintain the finality of decisions of the Administrator of Veterans Affairs. Subsection 211(a), as amended in 1970, provides:

On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court

7.

of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

The constitutionality of that provision has been upheld over the years, based in part on the theory that Congress may provide an exclusive administrative remedy when it creates rights in individuals against the Government. However, recent court decisions have qualified the sweeping immunity from court review provided in subsection 211(a) by assuming jurisdiction, not only of challenges to the constitutionality of statutes, regulations, and procedures governing Veterans Administration benefits, but also of challenges to the Administrator's authority to promulgate regulations.

The most significant of these cases is Johnson v. Robison, 415 U.S. 361 (1974). In Robison, the Supreme Court declared that subsection 211(a) does not preclude court review of challenges to the constitutionality of veterans' benefits legislation. On the merits, the Court upheld the constitutionality of a statute denying veterans' educational benefits to conscientious objectors who had not served in the military but had instead performed alternative service.

c.

The rationale of the Robison holding was extended in Plato v. Houdebush, 397 F. Supp. 1295 (D. Md. 1975), to permit review of VA hearing procedures. The court held that the VA's failure to provide a pension recipient an opportunity for a pretermination hearing was a denial of plaintiff's due process rights and that subsection 211(a) does not preclude court review of the constitutionality of VA procedures. This case has been relied on as a basis for jurisdiction in a number of subsequent suits questioning the constitutionality of agency procedures.

Further development following Robison has taken place in a series of cases in which both institutions and individuals have sued to challenge the validity of VA regulations. In each case a Federal appellate court held that, notwithstanding the language of subsection 211(a), questions of the statutory authority underlying the promulgation of regulations are judicially cognizable. The leading example is Wayne State University v. Cleland, 590 F.2d 627 (6th Cir. 1978), in which regulations governing the veterans' educational assistance program were attacked as being in excess of statutory authority. The court considered the merits of the regulations and ruled in favor of the Government, holding the regulations to be valid. More recently, a female veteran has successfully challenged a regulation barring VA hospital care benefits for routine pregnancy and childbirth. Kirkhuff v. Cleland, No. 79-2310 (D.D.C. May 8, 1981).

9.

It must be kept in mind that Robison and its progeny have all involved statutes, regulations, or procedures, i.e., congressional or agency decisions and practices of universal, binding application. We point this out in order to stress the continued vitality of subsection 211(a) in shielding the Administrator's decisions on individual, fact-specific cases from judicial review.

A recent case applying this vital distinction was Carter v. Cleland, 643 F.2d 1 (D.C. Cir. 1980), in which the plaintiff sought court review of the VA's determination, affirmed by the Board of Veterans Appeals, that she was not entitled to receive a survivor's pension. Attempting to circumvent the finality statute, the plaintiff characterized her lawsuit as a challenge to VA regulatory action, although no regulation was actually involved; plaintiff alleged that an internal administrative guideline, interpreting existing statutory and regulatory requirements determining her eligibility for benefits, was invalid as being in excess of the Administrator's statutory authority. The court recognized that the plaintiff was actually seeking review of the Administrator's final decision on the application of the particular facts of her claim to the pertinent laws and regulations, and concluded that subsection 211(a) barred such review.

10.

Current Adjudication Procedures

Current Veterans Administration claims procedures are designed to assure the claimant due process and to prevent any possible abuse of discretion by the Administrator. These procedures are defined by statutes and regulations which charge the VA with the duty to assist the claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law. 38 C.F.R. § 3.103(a). Further, if the evidence presented raises a reasonable doubt regarding service origin, degree of disability, or any other point, VA regulations provide that such doubt is to be resolved in favor of the claimant. 38 C.F.R. § 3.102.

The most salient characteristic of the VA claim process is its informality. In most cases, a claimant may submit an application without need of any assistance, and without an attorney. If a claimant desires assistance, or needs advice, access is provided to VA employees who specialize in answering inquiries and assisting in the development and submission of claims. At the same level, there exists a wide network of veterans' service organizations which furnish technically proficient claims specialists at no charge to assist claimants in the presentation of their claims.

11.

In almost all cases, a claimant need do nothing more than file a claim on a proper application form. Generally, the Agency will procure all of the evidence necessary to establish the claimant's eligibility for the benefits sought. Where the evidence is insufficient to grant the benefit, the claimant is advised what evidence is required and what sources are acceptable.

Any decision with which a claimant disagrees may be appealed within the Agency by merely filing a Notice of Disagreement. This will initiate a review of the claim and, if it remains denied, the preparation of a Statement of the Case. A Statement of the Case sets forth the facts and law relied upon to reach the unfavorable decision and the reasons therefor, and is designed to assist the claimant in preparing the best arguments possible to support the claim on appeal. If, after receiving the Statement of the Case, a claimant remains dissatisfied with the decision, the appeal will be heard by the Board of Veterans Appeals. The Board's decision, made after a complete and independent review of all of the evidence of record, is final.

Hearings are available at almost any point in the claims process, both at the initial level of adjudication and at

12.

the appellate stage. Such hearings are conducted informally, and, although the Agency attempts to provide all possible assistance, a claimant may be represented by an attorney or one of the 'service organizations' claim specialists.

The foregoing procedures have evolved over the years and in general have functioned well by providing maximum services to the veterans of all eras. In addition, we believe that they meet all of the requirements of fundamental fairness and compare favorably with the procedures of other Government agencies administering benefit programs. Finally, we believe that our procedures continue to comply with the evolving concept of "due process." This is one of the reasons we believe legislation such as that proposed in S. 349 is unnecessary.

At your request, Mr. Chairman, we have provided the Committee a report on S. 349, analyzing its various provisions in depth. To sum it up, I would note that our report expresses the VA's opposition to the bill for the basic reasons I have mentioned today, namely, that judicial review legislation is unnecessary and does not justify the additional governmental burdens it would engender.

13.

In closing, let me say we at VA welcome the opportunity to explore with Congress the complex questions raised by judicial review and related issues. We stand ready to assist you in any efforts to enhance the Agency's ability to perform its mission on behalf of veterans, their survivors, and their dependents.

This concludes my prepared remarks, Mr Chairman. I would be pleased to respond to any questions you or other members of the Committee may have.

Chairman SIMPSON. Your statement involves almost exclusively the issue of judicial review. But, as I noted in my opening statement, there are other changes in S. 349 in other areas, which we may be able to address separately.

One of the issues you touched on is—which could be addressed without any change to the limitation on judicial review—is the limit on the amount an attorney may receive for representing a veteran before the VA.

I don't personally see any reason to continue the limit, which has the effect of preventing veterans, except those indigent enough to qualify for legal aid, from seeking the assistance of an attorney.

But I guess I wonder what would occur if this legislation which, in many ways, is excellent, would ever get to be referred to as a "lawyer's bill".

What do you think of that one?

Mr. Cox. Well, there are times that I would like to see some lawyer's bills, but not this particular one. This is a case where reasonable minds differ, I think.

I have heard two lines of argument. One is that if you increase the fee you are liable to end up with a lot of lawyers who will seek out veterans, in order to get more business. It is an overcrowded profession, and you are going to have a lot of advertising.

They are going to be looking for veterans, since this is a good way to pick up \$250 or \$500 or \$750. I think that is probably a harsh judgment. Yet, there are some who feel that.

They feel that it is totally unnecessary in this type of case to get lawyers involved, because the veterans' organization representatives, and, in many instances, representatives of State and local government, who have their own veterans' offices—I know in Nebraska, we have our own veterans' service officers in the State are doing a magnificent job.

They are representing veterans well. I think the feeling is, why get involved in this type of elaborate scheme and encourage attorneys to come in where it is not necessary?

Yet you are going to be able to find some cases where I am sure that an attorney may do a better job.

Chairman SIMPSON. Well, I have some grave reservations about the issue of attorneys' fees, and that can quickly divert us from some of the good portions of the legislation, if it becomes known that the brethren and sisters of the bar are really promoting this one, and, of course, they are, officially through the American Bar Association.

They have endorsed it. Whether that will be misread as some type of employer's insurance bill or something causes me concern. And yet I do believe that many lawyers would take years to gather the expertise that has been obtained by the veterans' groups who represent these veterans.

Even some nonlawyers in that area are much more capable than many lawyers would be after many years experience.

And after, as I say, being here in this remarkable arena for just 2½ years, I am convinced, and I am a lawyer, that lawyers are really grinding this joint to a halt.

And that is a problem, especially as they stack distinction on distinction and administrative rule upon administrative rule, and it is a concern to me.

I am not saying it in a smart-alecky way. It really is. If I were a young lawyer and got to go to Washington, D.C. I sure wouldn't want to go to just work; I would go to change things.

And the way you change things when you are down in the eighth rank is just to start cranking it out. And they have done a magnificent job of obscuring many things and leaving us, I think, less well off.

A couple other questions, Bob. Title 2 of S. 349 would amend title 38 to require the VA to adhere to the notice and comment requirements of the Administrative Procedure Act when the agency issues its regulations.

I realize that the VA has issued a regulation under which this notice and comment procedure is followed on a voluntary basis. Is there any reason not to elevate this to a statutory condition?

Mr. Coy. We have no objection to that. The problem is that we have a lot of laws on the books, and if laws are necessary, then we should have them. This is the case where I don't think they are necessary.

But if somebody believes we should have another law, then we certainly have no objection to it.

Chairman SIMPSON. There are some changes suggested to the VA's internal adjudication procedures in title I of the bill. Many are designed to codify previous adjudication procedures, that, again, at present are based only upon regulations or practice.

Is there any reason why, even if the committee were to reconsider its position on judicial review, that we should not consider the provisions of title 1 to assure that the current adjudication procedures that do benefit the veterans are not changed without congressional direction?

Mr. Coy. Well, Mr. Chairman, when I went to sleep last night, it must have been around 12 o'clock, I was reading this novel which is the report of the committee last year on the bill.

When I woke up this morning it was laying on the bed, so I hope I assimilated some of it during the night. I noted in there that one of the reasons the report indicated that they should put this into

law is that somehow the procedures that the VA now follow might be changed, because we might get irritated with the judicial review approach, and decide to get more restrictive.

That is not going to happen. And I just don't think it's wise or necessary to legislate the procedures that an agency should follow to try to implement a law.

I think that there comes a point in time when some discretion is necessary, and we are not about to use bad faith and take away rights that we now provide.

That's not a fair rap. And, therefore, we don't favor this provision; we don't think it's necessary. Now I have to admit, I have no objection to many of its provisions.

Many of the provisions we now follow and they are good provisions. I just don't think that legislation is necessary in this area.

Chairman SIMPSON. I must say that if you are using that for evening bed-time reading, I would suggest a sabbatical. [Laughter.]

Mr. COY. After tonight, I agree. Tonight I will not take it home. [Laughter.]

Chairman SIMPSON. Thank you. A couple of other questions, then Frank may have a few. We talked about costs of judicial review and how the principal reason for the VA's change in position is the expected cost.

However, other testimony we received and will receive today supports an expansion of the statutory limit on the size of the Board of Veterans' Appeals, with or without a change in the limitation on judicial review.

What part of your estimated costs would still occur if the BVA was expanded, as is proposed, and we made no changes in the judicial review situation?

Mr. COY. I'll let Mr. Shuman—you are talking about the expansion of the Board—

Chairman SIMPSON. Yes.

Mr. COY. I will let Syd answer the question.

Mr. SHUMAN. Mr. Chairman, insofar as adding just one additional section to the Board, the cost is \$714,000. That would put us up to 16. If we added the additional 17th section, that would be an additional \$622,000.

So you are running in excess of a million three there.

Chairman SIMPSON. OK. Now that question of cost I think is an interesting question to the Committee about the BVA and its relationship with the rest of the VA.

When decisions are made regarding the BVA's staffing and funding levels and so on for a particular year, what is the BVA Chairman's role in presenting the justification for that greater staffing or funding outside the agency?

Mr. COY. Syd?

Mr. SHUMAN. Are you asking me that?

Chairman SIMPSON. Well, both of you.

Mr. SHUMAN. Well, the BVA prepares its own budget. We indicate what we feel is the projected workload, how many people we are going to need to handle that workload.

We do submit our budget to the Controller, along with all the other departments. Then we have an internal meeting where we

hash out where the priorities are and who is going to take priority over somebody else.

Sometimes I get something and sometimes I lose, but I am in the whole pile, just as the huge departments are.

Chairman SIMPSON. I guess one of the reasons or one of the things that keeps coming up is the independence of the BVA; that keeps coming back, the theme.

And certainly there is a limit in current law on the BVA's independence, which is section 4004(c). Under that section the Board is bound, that's the phrase, in its decisions by VA regulations, instructions of the Administrator and precedent opinions of the General Counsel.

If the committee was interested in providing greater independence to the BVA, would it not be appropriate to remove those conditions?

Mr. SHUMAN. Well, I'm sure——

Chairman SIMPSON. Go ahead.

Mr. COY. I just want you to know that the General Counsel opinions are always right.

Mr. SHUMAN. I doubt that.

Chairman SIMPSON. Well, the Chair will take judicial notice that that is not true.

Mr. SHUMAN. The courts themselves follow agency rules and regulations when they adjudicate. Of course, they can rule a regulation or a law unconstitutional, whereas we do not have that authority.

I think we are going to be bound by laws. I think we should be bound by the laws and the regulations that are issued pursuant to those laws.

I don't think that lessens our independence too greatly. If a veteran wants to take a question concerning the constitutionality of a law or regulation to court, that review is still available to him.

Chairman SIMPSON. Well, it does appear to me that that condition of the statute really does, you know, take away some of the so-called independence of authority, and that is of interest to me.

Mr. SHUMAN. Well, Mr. Chairman, I will take all the independence this Committee wants to give us.

Mr. COY. It's already independent.

Mr. SHUMAN. I might say this—I have never, in the time that I have been at the Board, had an Administrator tell me which way to decide a case. I have never had any interference with decision-making.

Chairman SIMPSON. In any situation?

Mr. SHUMAN. In any situation. Nor have I ever been told that, "You are going to give a retroactive award of"—well, I—the largest one I can remember was 70-some thousand dollars.

I was also never told that we shouldn't do that, on that kind of a case.

Chairman SIMPSON. I think that is helpful to the committee. Well, I have some other questions, but I do not want to intrude on the time of my colleague; if you have questions, Frank, please proceed.

Senator MURKOWSKI. Thank you, Mr. Chairman.

Chairman SIMPSON. And I will add mine in the record.

Senator MURKOWSKI. Can you identify where adjudication is necessary by you and/or your associates in determining just whether or not the claim is being handled reasonably.

And is this necessary because of the way the qualifications are written? My point being, it would seem to me that if a qualification is carefully laid down to a recipient, we can all read, and we don't necessarily need an attorney to interpret what the requirement is, unless it is, perhaps, written in such a way as to be ambiguous.

And my basic question is, Would clarifying the intent expedite the processing and perhaps eliminate the need for what we are discussing here, namely the Federal courts getting into the picture?

And is there one or two areas more identifiable in the qualification process than others?

Mr. COY. I find that question kind of difficult to answer, because I think that the standards are already clear. Most of the cases of disagreement that I have seen are factual issues in which an individual disagrees with our judgment as to whether he has a 10-percent, a 30-percent, or a 50-percent disability.

And there is a rating schedule——

Senator MURKOWSKI. I know, but that disability is not determined by your group. I assume that is done by a qualified medical——

Mr. COY. Yes. There are physicians on the panel.

Mr. SHUMAN. I am sorry for the interruption, but, Senator, you have to understand that 75 percent of the cases coming before the Board of Veterans' Appeals involve a medical question.

They are factual. It is something that we have to determine.

If it happened in service, we give it to them. There is no question about it; the proof has to show that. So that is clear cut. Another question that we face in a large group of cases is whether or not, if it preexisted, was it aggravated beyond natural progress.

Again, that is a situation where we have three men, two lawyers and a doctor, when I am talking about the Board. When it is in the regional office it is maybe two lay people and a physician, who sit, look at the facts, and see if they can come to a reasonable conclusion that, yes, this was incurred in service, or, no, it is not related to another thing that happened in service, no, it wasn't aggravated beyond the natural progress of the condition.

Then we have some legislative medicine, and there are a number of those where we have these presumptions that run from 1 year to 7 years. If something happens within that period, such as a neurological disease, we will, then, on a factual basis allow the case.

I think it is clear cut. I think the requirements are spelled out. The difference is how you evaluate the evidence. What I evaluate and what you might evaluate, Senator, may lead each of us to a different conclusion.

Senator MURKOWSKI. So most of these do involve, then, your Board with some referral to medical experts, so to speak. And this would also actually run over in the Federal courts, where they would be theoretically calling in other experts to perhaps challenge the expertise of your medical experts.

Is that not the way it would probably come out if——

Mr. SHUMAN. I think that the way the bill is written you may well have that. But the way we operate today, that isn't so. We have the——

Senator MURKOWSKI. That isn't so. So you have one medical expert theoretically challenging another medical expert, somebody at the time——

Mr. SHUMAN. Somebody——

Senator MURKOWSKI [continuing]. Being that the judge would make a decision based on that?

Mr. SHUMAN. No, we would make—today we would make that decision.

Senator MURKOWSKI. Under the new——

Mr. SHUMAN. Under the new law——

Senator MURKOWSKI [continuing.] Made this decision.

Mr. SHUMAN. Yes.

Senator MURKOWSKI. And did I understand you correctly when you indicated that you estimated the cost to run about—what, nine——

Mr. SHUMAN. Million.

Senator MURKOWSKI. You used \$9 million as administrative costs under the bill?

Mr. SHUMAN. Yes, that's the bill.

Senator MURKOWSKI. All right. And did I understand you to say that your claims—you estimated your claims would cost less than \$3 million?

Mr. SHUMAN. That is correct.

Senator MURKOWSKI. So, in other words, you could basically not contest the claims and save \$6 million? Is that what you are telling me?

Mr. SHUMAN. Well, you would have a difficult problem picking out the ones that would equal \$3 million that you are not contesting.

Senator MURKOWSKI. I know. But since we are playing with arithmetic here, in other words, you are talking about a claim that was contested, you are talking about \$3 million, and you are talking about a bill of \$9 million in administrative costs.

Mr. Chairman, it would appear to me that the Government could save a lot of money just by saying "yes" in the contested claims, rather than pursue what is proposed in this bill.

Mr. COY. Let me say that the cost estimate of \$3 million was our estimate of those cases where the result would be different in the court. In most cases I think the judge of the court would agree with us.

Senator MURKOWSKI. You can save them that.

Mr. COY. I want to correct one thing. The bill would not provide for a trial, de novo. It would be a review on the record, although there is some provision in there for an additional medical evaluation or medical judgment, what do you call it—medical expert?

Mr. SHUMAN. Medical expert.

Senator MURKOWSKI. I have no other questions, other than to add to the record that I am not a lawyer, but I can read and make decisions. I think that we need more people like that around Government.

Chairman SIMPSON. I could not concur more, my colleague. We will have some additional questions. I know you have another obligation, Bob.

I am certain there will be followup questions based upon the agency report on S. 349 which was received by the committee just this morning.

We will now go to the statement of Mr. Shuman, and you may leave, Bob.

Mr. COY. I thank you. We will be happy to respond to any question for the record, as well as work with the committee staff if there are areas you do want to discuss more.

Chairman SIMPSON. We have always found that to be so. Thank you.

Mr. COY. Thank you. We will shift some of the players, Mr. Chairman.

[The response of the Veterans' Administration to written questions submitted by Hon. Alan Simpson, chairman of the Senate Committee on Veterans' Affairs, follows:]

RESPONSE OF THE VETERANS' ADMINISTRATION TO WRITTEN QUESTIONS SUBMITTED
BY HON. ALAN K. SIMPSON, CHAIRMAN OF THE SENATE COMMITTEE ON VETERANS'
AFFAIRS

Question 1. On the issue of the status of the chief members of the BVA under the Civil Service Reform Act, if the VA were to so decide wouldn't it be possible to exempt these members from the merit pay system by Administrative action?

Answer 1. It is not possible for the VA to exempt the chief members of the BVA from the merit pay system by administrative action within the Agency. The only possible methods of removing the chief members of the BVA from merit pay would be either to no longer assign them to supervisory duties or to obtain a presidential exclusion under 5 U.S.C. § 5401(b)(2). To obtain the presidential exclusion, application must be made through OMB, which must review the reasons for the exclusion and recommend to the President whether to make the exception. Otherwise, the merit pay system is applicable to the chief members. Consistent with the definition of supervisors under 5 U.S.C. §§ 5401(b)(1) and 7103(a)(10), chief members have been determined to be supervisors. They clearly are individuals "having authority in the interest of the Agency to hire, direct, assign, promote, reward,

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transfer, furlough, lay-off, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action" 5 U.S.C. § 7103(a)(10). To classify chief members of the BVA as not supervisory with their current duties would not be in keeping with the meaning and the intent of merit pay principles under the Civil Service Reform Act.

Question 2. On page 7 of your statement, you note that the constitutionality of the bar to judicial review provision has been upheld, in part, "on the theory that Congress may provide an exclusive administrative remedy when it creates rights in individuals against the Government." Doesn't this theory, as applied to the VA, rely on a finding that veterans do not have a property interest in VA benefits--that VA benefits are mere gratuities--and is this theory still valid in the wake of decisions of the Supreme Court such as Goldberg v. Kelly which held that welfare recipients have a property interest in welfare payments sufficient to require various due process protections?

3.

Answer 2. The theory noted on page 7 of our statement does not rely on a finding that veterans do not have a property interest in VA benefits--that VA benefits are mere gratuities. As explained by the District of Columbia Circuit Court of Appeals in DeRodulfa v. United States, 461 F.2d 1240, 1258 (D.C. Cir. 1972), the constitutionality of 38 U.S.C. § 211(a) is predicated upon both the gratuities theory and "another predicate possessing at least an equal measure of validity." The DeRodulfa Court characterized this other predicate as follows:

The Supreme Court has declared that 'the United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy through the courts; it may' instead 'provide an administrative remedy and make it exclusive' That is precisely what Congress did in the current version of Section 211(a), and Congress was well within its legislative prerogatives when it did so.

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Id, Citations omitted, see also Switchmen's Union v. National Mediation Board, 320 U.S. 297 (1943) and Railway Clerks v. Non-Contract Employees, 380 U.S. 650 (1965).

As to the second part of your question, there may be continued validity in the theory that veterans' benefits are gratuitous. As noted above, however, it is not necessary to rely on that theory as the basis for the constitutionality of the bar to judicial review of individual veterans' benefit decisions.

In addition, it should be recognized that the Supreme Court in Goldberg v. Kelly 397 U.S. 254 (1970), while noting that "it may be realistic today to regard welfare entitlement as more like 'property' than a 'gratuity'," in fact, characterized the interest that a welfare recipient has in welfare payments as a statutory entitlement rather than as a property interest. Id at 261 n.8. The Goldberg Court viewed the constitutional issue in that case as a narrow one. That is, whether the due process clause requires that a welfare recipient be afforded an evidentiary hearing before payment of welfare benefits may be terminated. Id at 260.

5.

After characterizing a welfare recipient's interest as a statutory entitlement, the Court concluded that due process must be afforded prior to termination.

We are not aware of any case which holds that due process protections include a right to judicial review. Thus, in our view, even if veterans' benefits, like welfare benefits, are characterized as statutory entitlements, it does not follow that individual VA benefit decisions would thereby become subject to judicial review.

Question 3. On page 8 of your statement, you note that the Plato decision has been relied on in a number of subsequent suits. Please provide citations for these suits for the record.

Answer 3. 1. Wayne State University v. Cleland, 440 F. Supp. 809 (E.D. Mich. 1977).

2. Carter v. Cleland, 643 F.2d 5 (D.C. Cir. 1980).

3. State of Colorado v. Veterans Administration, 430 F. Supp. 551 (D. Colo. 1977).

4. Sena v. Roudebush, 442 F. Supp. 153 (D. N.M. 1977).

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5. Devine v. Cleland, 616 F.2d 1085 (9th Cir. 1980).

6. King v. Housing Authority of the City of Huntsville Alabama, 496 F. Supp. 800 (N.D. Ala. 1980).

Question 4. On page 10 of your statement, you state that:
Current (VA) claims procedures are designed to assure the claimant due process and to prevent any possible abuse of discretion by the Administrator. How do you believe that these procedures can act as a check on possible abuses of discretion by the BVA?

Answer 4. We believe that the overwhelming majority of original decisions by VA Regional Offices are correct, and that our claimants and beneficiaries are satisfied with them. To further ensure that our decisions are correct and to serve as a safeguard against the occasional serious error in judgment, what you have labeled abuse of discretion, an appeal to the Board of Veterans' Appeals is provided each claimant by law as a matter of right. A disappointed claimant may obtain a de novo review of his claim by an independent appellate board designed for this purpose and staffed by experts. We must, of course, acknowledge that the BVA can make errors--but so

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can a Federal court. In fact, we do not believe that Federal judges, in the limited number of veterans' cases which would come before them if judicial review were available, could easily develop the expertise needed to significantly contribute to the claims process. We would likely see a few more allowances as a result of court reversals and remands, but we would not expect to see any significant systematic checks on improper agency action or a consequent improvement in agency decision-making quality. To return again to the Social Security system, which has frequently served as a point of reference in our discussions of judicial review over the past two Congresses, we cite the comprehensive evaluation of the system prepared by the Center for Administrative Justice in October 1977. That document, entitled "Study of the Social Security Administration Hearing System," supports our opinion that Federal district court participation in individual benefits claims would not serve to improve the quality of the VA claims process or contribute to the fairness or procedural due process afforded our claimants.

Chairman SIMPSON. Syd, you might introduce your staff.

Mr. SHUMAN. On my right will be Mr. James Derhaag, and on my left will be Mr. Jan Donsbach. Mr. Derhaag is here for statistical purposes, since he carries them around.

And Mr. Donsbach is here for legislative problems that may come up.

I have a summary, and, hopefully, it will not take 5 minutes.

Chairman SIMPSON. Thank you.

Mr. SHUMAN. Mr. Chairman, I welcome the opportunity to appear before this committee to discuss several issues concerning the Board of Veterans' Appeals. These include the Board's current workload, its ability to meet the demands of that workload, and the status of the chief members of the Board under the merit pay provisions of the Civil Service Reform Act.

One of the Board's major objectives is the efficient processing of all appellate decisions. To attain this objective, the optimum average processing time of appeals should be 90 days.

The longest processing time at the Board of Veterans' Appeals for any single appeal should be held to a maximum of 180 days.

We must, naturally, look at employment levels and workloads when considering processing time. The more people, the more output. Following a dramatic drop in appeals in 1974, the Board cut back to 13 sections in November 1974.

A section of the Board consists of three members, seven opinion-writers, generally, one secretary and some support personnel in our administrative service. In March 1975, appeals started to increase.

By September 1977 we had 16 sections in operation, but budgetary restraints caused us to drop one section in October 1980, while the caseload remained steady.

The length of time a particular case remains at the Board is also influenced by reviews and hearings conducted by the appellant's representative, complexity of the issue, the number of issues raised, and the Freedom of Information Act.

In 1977 we required on the average 102 days of processing time. This increased to 136 days in 1980, and we estimate 217 days in 1982.

These figures, of course, are based on the assumption that the personnel ceiling will remain steady. The way to reduce processing time is to add more sections, and I have testified as to the cost; \$714,000 for one section; an additional \$622,000 for a second section.

I would now like to summarize our position with respect to chief members, GS-15, being placed in merit pay under the Civil Service Reform Act.

The job, in my opinion, does include significant supervisory duties, which places it under the merit pay provisions. However, it is a fact that the two other GS-15 Board members in the section, who have equal responsibility in deciding cases, could conceivably receive greater pay than the chief member, since they are not under merit pay.

The situation is not a morale builder, and would cause management problems. The chief members feel that any rating system interferes with their independence in decisionmaking, and want to

be placed on a par with ALJ's insofar as increases in pay are concerned.

While I do not want to undermine the independence of Board members in reaching their decisions, we feel that the Chairman of the Board has a clear responsibility to provide general directions and guidance to the section.

Prior to the Civil Service Reform Act, the Board had an evaluation procedure for all employees, including chief members.

The merit pay system does not significantly improve these procedures, or provide any additional management tools. Because of this, the Board would not object to any legislative effort, if one is recommended, which would simply remove the chief members from the merit pay provisions of the Civil Service Reform Act.

This concludes my summary, and, again, Mr. Chairman, I wish to thank you for the opportunity to appear before you and your committee, and we will be happy to answer any questions that you might have.

Chairman SIMPSON. Thank you so much. Your succinctness is appreciated.

[The prepared statement of Sydney J. Shuman, Chairman, Board of Veterans' Appeals, follows:]

PREPARED STATEMENT OF SYDNEY J. SHUMAN, CHAIRMAN, BOARD OF VETERANS
APPEALS, VETERANS' ADMINISTRATION

Mr. Chairman and Members of the Committee:

I welcome the opportunity to appear before this Committee to discuss several issues concerning the Board of Veterans Appeals (BVA). These include the Board's current workload, its ability to meet the demands of that workload, and the status of Chief Members of the Board under the merit pay provisions of the Civil Service Reform Act.

The mission of the Board of Veterans Appeals has been described as follows: To equitably decide appeals under all laws administered by the Veterans Administration and ensure that appellants are accorded due process of law; to provide compassionate, sensitive, responsive, sympathetic, and timely consideration of appeals, and to grant all benefits to which veterans and their dependents are entitled. Notwithstanding the question of judicial review of our appellate decisions, which is also under consideration by the Committee today, we are committed to fair and sympathetic treatment of the issues raised in each case before us. Our appellate deci-

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sions should reflect that every issue on appeal was carefully considered; that all relevant evidence was reviewed and afforded the appropriate weight, and that the relevant statutes and regulations were analyzed and applied in reaching the decision. Each of our narrative decisions should also be communicative so that the appellant is made to better understand the merits of his claim and to acknowledge that he was given every consideration under the law, including the resolution of reasonable doubt in his favor.

One of the Board's major objectives is the efficient processing of all appellate decisions before the Board. To attain this objective, the optimum average processing time of appeals (response time) should be 90 days. The longest processing time at the BVA for any single appeal should be held to a maximum of 180 days.

The workload of the Board of Veterans Appeals dramatically increased in 1977. The Board received 29,945 appeals in 1976 and 36,721 appeals in 1977. I would like to discuss the workload changes and the parallel increase in average appeals processing time over this period.

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Workload

(See also Attachment #1).

	<u>1977</u>	<u>1978</u>	<u>1979</u>	<u>1980</u>	(Est.) <u>1981</u>	(Est.) <u>1982</u>
A. Appeals Rec'd	36,721	36,655	34,124	34,556	35,358	35,000
B. Decisions Dispatched	33,296	35,634	34,972	34,030	32,000	32,000
Ending Docket	11,470	12,491	11,643	23,642*	27,000	30,000

*Adjusted figures due to VARMS change over

The processing time of the Board is continuing to increase because of the volume of receipts.

Average Appeals Processing Times at the BVA (Calendar Days)
(See also Attachment #1)

<u>1977</u>	<u>1978</u>	<u>1979</u>	<u>1980</u>	(Est.) <u>1981</u>	(Est.) <u>1982</u>
102	122	127	136	183	217

The time spent on particular cases varies widely.

The most important reasons for this variance are whether the appellant has a representative, a formal hearing has been held, the case is complex and/or there are correspondence or inquiries to answer. Each Section of the Board has a goal of 40 decisions per week.

In May 1977 it was determined that the Board of Veterans Appeals, under the Freedom of Information Act, was required to index and make all decisions available to the public. However, now that we have such an index to BVA decisions, it is used by service organizations, student legal aid societies, and BVA attorneys.

In recent years the demands placed on attorneys and Board Members have increased. The number of issues presented on appeal is averaging two per decision. Three or four years ago the average was 1.2 to 1.5. Attorneys are writing longer Discussion and Evaluation sections in order to fully set forth the reasons for the decision and to answer the contentions of the appellant and representative. The availability of the index has afforded them a greater opportunity to do preliminary research before preparing a tentative decision, and has enabled the Board to be more consistent in its decision-making.

An analysis of processing time would be incomplete without a discussion of BVA personnel. The Board of Veterans Appeals has 15 Board Sections. During the peak Vietnam-era years of 1972-1973 the Board of Veterans Appeals had 14 Sections. Following a dramatic drop in appeals in 1974, the Board cut back to 13 Sections in November 1974. Just after that, by March 1975, there was a sharp upswing in appeals--due to the recession. The Board reactivated Section 14 in July 1975. The increases in appeals continued. The Board formed Section 15 in January 1977--and Section 16 in September 1977. As of October 1980 the number of Sections was reduced to 15 due to budgetary restraints.

5.

Each Section has three Members. Fourteen of the 15 Sections have two Legal Members and one Medical Member and the other one has three Legal Members. In addition, each Section has seven or eight staff attorneys and a Section secretary. Additional support comes from the Board's Administrative Service. This element--now authorized 137 people--maintains the docket, schedules hearings, handles correspondence, and provides mail and record activities, secretarial service, and similar duties.

Two quality procedures are in effect at the Board to monitor the professional performance of the staff attorney and the overall quality of an appellate decision. Every 3 months the staff attorney is evaluated by the supervisory Chief Member who uses a form consisting of 20 factors designated to evaluate the quality of the attorney's performance. These factors cover such things as accuracy, knowledge of VA law, clarity of written expression, and other basic work characteristics. The extent to which work must be revised, the ability to handle complex matters, and contributions made to the Section are reviewed by the supervisor. In the case of GS-14 staff attorneys, their ability to act in a quasi-judicial capacity is also evaluated since they are potential candidates for Board membership.

6.

The other quality evaluation procedure is the random selection and review of approximately 10 percent of all decisions dispatched from the Board. These decisions are forwarded to a Quality Review Committee for a detailed critique. All parts of the decision are carefully scrutinized, such as the statement of "Contentions", "Discussion and Evaluation", "Findings of Fact", etc., to determine the accuracy and completeness of the decision. This review, conducted by the Deputy Vice Chairman, who has no knowledge of the author or signatories of the decision (to insure objectivity in the assessment), is made in association with the claims folder. I feel that the Board's quality check insures a high standard of work and a well-reasoned appellate decision.

The Board is ever mindful that the appellant wants and deserves a timely decision. At the same time it is important that the appellant has an answer to all of the contentions, knows what law was applied and understands completely how the Board arrived at its decision. The only effective means of reducing the processing time, while preserving the high quality of decisions, is to increase the personnel at the Board and increase the number of Sections.

The continuation of 15 Sections at the Board will understandably result in an increase in processing time from 183 days in 1981 to 297 in 1986 and 1987. The expansion of

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the Board to 16 Sections would allow an ultimate reduction in the processing time to below 180 days. Instead of the projected 240 days in 1983, it would be 188 days. In the next several years the time would decrease each year with 115 days being estimated in 1987. (See also Attachment #2).

If the Board were able to increase its personnel to accommodate two additional Sections (17) the processing time could be reduced even further to 158 in 1983 and 89 days in 1987. Since 38 U.S.C. § 4001 sets a limit of 50 Board Members, one of the 17 Sections would have to consist of two Board Members.

I would also like to touch on the processing time in the field. This is the time from the filing of the Notice of Disagreement until the case is certified and transferred to the BVA, following the filing of the Substantive Appeal. Beginning in 1980, the time chargeable to the field station ends when the case is certified and awaiting call-up by the Board. A new automated docketing system (VARMS) took effect in 1980 which allows pending appeals to be kept at the regional office until called for by the Board. This allows us to control the number of cases physically at the Board.

Field Processing Time (Calendar Days)

	<u>NOD to SOC</u>	<u>SOC to SA</u>	<u>SA to BVA</u>	<u>TOTAL</u>
1977	66	52	74	192
1978	53	55	77	185
1979	53	54	89	196
1980	54	58	96	208

The cost of an additional Board Section would be \$714,000 in 1983 funds. The expansion to 17 Sections would cost another \$622,000 for a total of \$1,336,000. These costs include the personnel which comprise the Section as well as the necessary administrative staff. The basic FTEE level planned for the Board in 1983 is 332. One additional Section would increase that level to 351. A further increase to 370 would be necessary to establish 17 Sections. (See also Attachments #3 and #4).

In summary, processing time is entirely people dependent. The more Sections at the Board the greater the dispatch rate. You will note in the Attachments that, at this time, two additional Sections are not felt necessary beyond 1985. We predict a falloff in the number of receipts in 1986 from an estimated 34,000 to 33,000, and to 32,000 in 1987. This would allow the Board to have the option of cutting back by one or two Sections in 1987. If we continue with 16 Sections through 1986 we could reduce the weekly quota of decisions for each Section, thus allowing Board

Members more time to review each case. Attorneys would also have more time to prepare tentative decisions. However, if the current trend continues we may find more issues per appeal and greater complexity in the issues themselves.

We are aware of the Committee's interest raised by several Board Members concerning their status under the merit pay provisions of the Civil Service Reform Act. This issue first arose in a grievance submitted by the Chief Members to the Administrator on February 21, 1980. The Deputy Administrator, following the completion of the internal VA grievance procedure, held that the position of Chief Member met the statutory definition of supervisor, but not of management official.

Very basically, the Civil Service Reform Act [5 U.S.C. § 5401(b)(1)] requires that Federal employees paid at the GS-13 level or above be placed under the merit pay system, if they fall into the category of either supervisors or management officials. Board Members are all paid at the GS-15 level, including Chief Members. The objectionable aspect of merit pay for quasi-judicial employees revolves around their concern that decisions unpopular with higher management officials may result in lowered performance appraisals. This, they believe, threatens their independence in decision making.

10.

In adopting the decision of the Grievance Examiner, the Deputy Administrator's final decision made two recommendations. First, he directed the Chairman to explore the feasibility of removing supervisory duties from the position of Chief Member. Following discussions with the Chief Members, the Chairman decided not to remove significant supervisory duties. This was largely due to their reluctance to accept a proposed additional layer of supervision. Second, the Chairman was asked to consider recommending to the Administrator that he, in accordance with 5 U.S.C. § 5401(b)(2), apply to the Office of Personnel Management for an "exclusion." Discussions with VA personnel officials led to a conclusion that such an application would be futile, and none was ever made.

We still believe that our decision to place the Chief Members under the merit pay system was correct, since there was no real flexibility for us under the new law. The position of Chief Member does, in fact, include significant supervisory duties which cannot be reallocated elsewhere under the current structure of the Board. The Chief Members, of whom there are fifteen, are at the next logical supervisory level below the Chairman and Vice Chairman, and head

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the basic organizational unit of Members and staff attorneys, the Board Section. The Chief Members, however, face the possibility of receiving less pay than the Associate Medical and Legal Members who serve in the same Section and are not under merit pay.

A possible alternative is to legislatively exempt Chief Members, or all Board Members, through a specific amendment added to 38 U.S.C. § 4001(b). Since we know of no bill to that effect, and have not been asked by the Congress for a report on such a measure, we have not had the opportunity to formulate and clear a final agency position. We are able to state that we have begun to consider whether the VA should recommend such an exception to OMB as part of our agency legislative program for the next congressional session.

We note that Administrative Law Judges have been specifically exempted from merit pay. We do not necessarily endorse an analogy between ALJ's and BVA Members. The BVA process is significantly different from that of ALJ decision-making, and our cases differ from the kinds of cases usually assigned to ALJ's in other agencies. The Board is designed to be a more centralized and uniform agency appellate body, with voting members and an attorney staff. It is

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clearly distinguishable from an independent ALJ whose determinations are subject to agency appellate review. The Chairman has a clear responsibility to provide general direction and guidance to the sections, while at the same time acknowledging their independence in each individual case.

Our efforts to improve the quality, consistency, and efficiency of Board decision-making do not depend on the merit pay status of any of the members. Certainly, we would not want to undermine the independence of a Board Section's decision-making in a particular case. The Board Sections should continue to be independent in their consideration of individual cases, making factual findings, applying law and regulations to the facts, and rendering the difficult judgmental decisions inherent in this highly sophisticated quasi-judicial process. We strongly support the provisions of section 4003 of title 38 which make the unanimous decision of the three-member section final and conclusive, and which call for the concurrence of the Chairman only when a unanimous decision is not possible. Prior to enactment of the Civil Service Reform Act the Board had effective evaluation procedures for all members. The merit pay system does not significantly improve these procedures or provide the Chairman with any additional management tools.

This concludes my prepared statement. I would be pleased to respond to any questions you might have.

BOARD OF VETERANS APPEALS

May 26, 1981

TIMELINESS

Number of BVA Sections	1977		1978		1979		1980		1981		1982	
	Actual	1/	Actual	16	Actual	16	Actual	16	Estimate	15	Estimate	15
Appeals Pending, Start of Period (in field stations)												
at the BVA	0,045		11,470		12,491		21,116		21,642		27,000	
Appeals Received	+16,721		+16,715		+16,114		(11,480)		(15,810)		(18,000)	
Total Workload	16,766		17,785		18,125		(11,466)		(7,812)		(10,000)	
Appeals Decided by the BVA	-11,706		-15,611		-15,712		+44,516		+35,384		+35,000	
Appeals Pending, End of Period (in field stations)	11,470		12,491		11,643		57,672		57,000		62,000	
at the BVA	(11,470)		(12,491)		(11,643)		-34,010		-27,000		-27,000	
Average BVA Processing Time in Days	162		122		147		21,642		27,000		27,000	
1/ 14 Sections effective October 1976							(15,810)		(18,000)		(18,000)	
15 Sections effective January 1977							(7,812)		(10,000)		(10,000)	
16 Sections effective September 1977							+44,516		+35,384		+35,000	

BOARD OF VETERANS APPEALS

May 21, 1981

TIMELINESS ESTIMATES

with

The Board Organized at Different Levels

	1983	1984	1985	1986	1987
The BVA Organized at 15 Sections (Current Services Level)					
Appeals Pending, Start of Period (in field stations)	30,000	32,000	34,000	36,000	37,000
(at the BVA)	(21,000)	(23,000)	(25,000)	(27,000)	(28,000)
Appeals Received	(9,000)	(9,000)	(9,000)	(9,000)	(9,000)
Total Workload	+34,000	+34,000	+34,000	+34,000	+34,000
Appeals Decided by the BVA	64,000	66,000	68,000	69,000	69,000
Appeals Pending, End of Period (in field stations)	-32,000	-32,000	-32,000	-32,000	-32,000
(at the BVA)	(21,000)	(23,000)	(25,000)	(27,000)	(28,000)
Average BVA Processing Time in Days	240	262	285	297	297

The BVA Organized at 16 Sections

Appeals Pending, Start of Period (in field stations)	30,000	29,000	28,000	27,000	25,000
(at the BVA)	(21,000)	(20,000)	(19,000)	(18,000)	(16,000)
Appeals Received	(9,000)	(9,000)	(9,000)	(9,000)	(9,000)
Total Workload	+34,000	+34,000	+34,000	+34,000	+34,000
Appeals Decided by the BVA	64,000	63,000	62,000	60,000	57,000
Appeals Pending, End of Period (in field stations)	-32,000	-35,000	-35,000	-35,000	-35,000
(at the BVA)	(20,000)	(19,000)	(18,000)	(16,000)	(13,000)
Average BVA Processing Time in Days	180	177	167	146	115

The BVA Organized at 17 Sections

The BVA Organized at 17 Sections

Appeals Pending, Start of Period (in field stations)	30,000	27,000	24,000	21,000	19,000
(at the BVA)	(21,000)	(16,000)	(15,000)	(12,000)	(10,000)
Appeals Received	(9,000)	(9,000)	(9,000)	(9,000)	(9,000)
Total Workload	+34,000	+34,000	+34,000	+34,000	+34,000
Appeals Decided by the BVA	64,000	61,000	58,000	54,000	51,000
Appeals Pending, End of Period (in field stations)	-32,000	-37,000	-37,000	-37,000	-37,000
(at the BVA)	(18,000)	(17,000)	(12,000)	(10,000)	(8,000)
Average BVA Processing Time in Days	158	148	99	94	89

1/- 17 Sections
2/- 16 Sections
3/- 15 Sections

ATTACHMENT 2

BOARD OF VETERANS APPEALS

May 26, 1961

COST

	1977 Actual	1978 Actual	1979 Actual	1980 Actual	1981 Estimate	1982 Estimate
FILE	293	333	333	329	330	332
Payroll	6,707	7,895	8,472	8,955	9,810	10,289
Travel of Persons	30	39	39	44	60	60
Transportation of Things	6	3	7	6	15	17
Rents	-	-	-	88	96	118
Other Services	75	257	212	279	223	289
Supplies	29	37	31	42	48	50
Equipment	24	36	50	32	42	53
Total	6,871	8,267	8,811	9,446	10,294	10,876

Chairman SIMPSON. What is the budget requirement per section, just generally?

Mr. SHUMAN. Per section, it costs about \$600,000. Between \$600,000 and \$700,000. You have to consider that you have three grade 15's, about two grade 14's, and then some 13's, 12's, and 9's. They run the whole gamut of the lawyer grades.

And then in addition to that, sir, we have to have administrative support, which not only supports that section but all of the sections.

Chairman SIMPSON. You say there are seven opinion-writers per section?

Mr. SHUMAN. Yes, sir.

Chairman SIMPSON. Are they all attorneys?

Mr. SHUMAN. Yes, sir. Sir, we have 35,000 cases to get out every year.

Chairman SIMPSON. Yes, I am aware of that. But the verbosity I would think would be increased sevenfold.

Mr. SHUMAN. Well, I wish Jon Steinberg were here. I think he would disagree with you on the *Demagno* case, because I think we didn't say enough in that.

Chairman SIMPSON. Well, that's the peril, too.

Mr. SHUMAN. That's right.

Chairman SIMPSON. Let me ask, for the record, I think it would be very helpful for us to have a further breakdown of your caseload.

I wonder if you would provide for the record information from the last 5 years on the subject matter of the cases before the Board, how many were for compensation benefits, how many education benefits and so forth.

Also, how many of the cases dealing with compensation involved the degree of disability or the linking of disability to the time of service.

Likewise, the number of cases that were before the Board for a second or a subsequent time, based on new or material evidence, the number of cases where the veteran might have asked for personal appearance, or that there was a hearing with only a representative present.

We would also like to know the number of cases in which the veteran was unrepresented, or represented by a veterans' service organization or represented by an attorney, with an itemization of success in each one of those categories; OK?

And the number of cases in which an independent medical opinion was requested by the Board and the number of cases that were remanded to a regional office.

With the new membership on this committee, this information it needs to be furnished. We have some very spirited new members who want to be involved in the process and I am most pleased to see that.

Mr. SHUMAN. We would be happy to do that.

[Subsequently, the Board of Veterans' Appeals submitted the following information:]

Question: For the record, it would be helpful to have a further breakdown on your caseload. With reference to the last five years, would you be able to provide information on --

The subject matter of the cases before the Board. For example, how many involved compensation benefits, how many education benefits and so forth, and, as possible, any further breakdown on the issues involved, for example, how many of the cases dealing with compensation involved the degree of disability or linking the disability to the time of service.

Answer: The mix of cases handled by the Board of Veterans Appeals remains virtually unchanged from year to year. For the past 5 years our records show the following percentages of appeals by issue: (In multiple-issue cases, the Board of Veterans Appeals enters separate decisions on legal and medical questions.)

Compensation - live veterans	77%
Service connection	(41%)
Increased rating (degree of disability)	(24%)
Other compensation issues	(12%)
Pension to live veterans	6%
Death pension and compensation	6%
Medical issues (e.g.) - Dental;	1%
Entitlement to prosthesis	
Payment for unauthorized medical services	
Loan guaranty benefits	1%
Training	3%

Waiver of overpayment	4%
Insurance	*
Character of discharge	*
Reconsideration	*
Other issues	*

* less than .5%

Question: The number of cases that were before the Board for a second or subsequent time on the basis of new and material evidence.

Answer: These statistics are currently unavailable. We are looking into the feasibility of extracting these data from our index. If it becomes available we will forward the report to the Committee.

Question: The number of cases in which the veteran sought a personal appearance or there was a hearing with only a representative present.

Answer: Appellants have an increasing interest in personal hearings before the BVA (in Washington or Travel Boards) or before regional office boards in lieu of a BVA hearing. The figures for the past 5 years show:

	<u>1976</u>	<u>1977</u>	<u>1978</u>	<u>1979</u>	<u>1980</u>
Formal Hearings	---	---	5,010	6,445	---
Washington	(712)	(1,022)	(947)	(1,037)	(1,306)
Travel Board	(429)	(466)	(505)	(484)	(485)
Rating Board	N/A	N/A	(3,558)	(4,924)	<u>1/</u>
Represented by:					
Service Organ.	23,063	26,827	29,264	28,657	28,978
Attorneys or	666	739	708	744	734
Agents					
None	4,753	5,730	5,662	5,571	4,314

1/ Figures for FY 1980 are not immediately available.

While the data are in the computer, the program to

extract and tabulate this information is still under development. Figures for FY 1978 and FY 1979 were prepared by the phased out VA Washington Data Processing Center. The Center was closed in budgetary cutbacks.

In each appeal where the claimant has one of the Service Organizations as his or her representative, there is either a personal hearing or some form of written presentation in support of the claimant.

Question: The number of cases in which the veteran was unrepresented, represented by a veterans' service organization, or represented by an attorney, with the success rate in each category.

Answer: For the past 5 years more than 82 percent of the appellants have selected a Service Organization as a representative; slightly more than 2 percent employed an attorney or agent; and 15 percent were unrepresented. The difference in the percentage of allowances between attorneys and Service Organization representatives is insignificant. Unrepresented appellants have fewer allowances. Here are figures for the years of interest:

	<u>Total Decisions</u>	<u>Allowances</u>
<u>FY 1976</u>		
Service Organizations	23,063	3,064 (13.3%)
Attorneys or Agents	666	90 (13.5%)
Unrepresented	4,753	468 (9.9%)
<u>FY 1977</u>		
Service Organizations	26,827	3,547 (13.2%)
Attorneys or Agents	739	98 (13.3%)
Unrepresented	5,730	589 (13.3%)

	<u>Total Decisions</u>	<u>Allowances</u>
<u>FY 1978</u>		
Service Organizations	29,264	3,756 (12.8%)
Attorneys or Agents	708	96 (13.6%)
Unrepresented	5,662	604 (10.7%)
<u>FY 1979</u>		
Service Organizations	28,657	3,734 (13.0%)
Attorneys or Agents	744	86 (11.6%)
Unrepresented	5,571	611 (11.0%)
<u>FY 1980</u>		
Service Organizations	28,978	3,626 (12.5%)
Attorneys or Agents	738	118 (16.0%)
Unrepresented	4,314	482 (11.2%)

Question: The number of cases in which an Independent Medical Opinion was requested by the Board.

Answer: The Board averages more than 200 requests for IME opinions each year. Here are the figures for the past 5 years showing the number of IME opinions requested and the number of decisions incorporating IME opinions:

	<u>IME Requests*</u>	<u>BVA Decisions*</u>	<u>Allowances</u>
FY 1976	237	218	91 (41.7%)
FY 1977	172	188	65 (34.6%)
FY 1978	201	230	89 (38.7%)
FY 1979	225	179	68 (38.0%)
FY 1980	<u>211</u>	<u>295</u>	<u>116 (39.3%)</u>
Total	1,046	1,110	429 (38.6%)

*The differences between the number requested and the number incorporated in decisions results from requests which carry-over to the next year and those in appeals which are remanded and allowed in the regional offices without further action on our part.

Question: The number of cases that were remanded to a regional office.

Answer: The Board's remand rate is about 14.7 percent. Our records show that field offices grant the benefits sought in 27 percent of remanded cases after they have completed development requested by the BVA. Details by year show:

	<u>Number of Remands</u>	<u>Benefits Granted by Field Office</u>
FY 1976	4,763	1,285 (27.0%)
FY 1977	5,204	1,383 (26.6%)
FY 1978	5,772	1,331 (27.9%)
FY 1979	4,701	1,111 (23.3%)
FY 1980	<u>4,892</u>	<u>1,482</u> (30.3%)
Total	24,392	6,592 (27.0%)

Chairman SIMPSON. On page 4 of your statement you noted that at the beginning of the fiscal year the Board was reduced to 15 sections.

Mr. SHUMAN. Yes, sir.

Chairman SIMPSON. This was due to budgetary restraints. Were you in a position to protest those cutbacks, both inside and outside of the agency?

Mr. SHUMAN. I was in a position to protest, and did protest inside the agency. Did I go to OMB on that one? I did not go to OMB on that one, sir; so I did not have an op—I don't think anyone had an opportunity in the Veterans' Administration to do much protesting in that budget.

Chairman SIMPSON. Have those budget restraints had any impact on either the number of panels that travel around the country or on the Board's requests for independent medical opinions?

Mr. SHUMAN. What we had to do, we thought it was going to have an impact on our travel program, Senator—Mr. Chairman, excuse me. And, in fact, we had adjusted so that we would send only two members on a travel Board, instead of three.

And then, by some stroke of luck, and I haven't figured out how, I got back more money in travel than I had asked for. So we were able to resume our three-person travel Board.

With respect to IME, no, sir. That—independent medical expert opinions we have not suffered any cutback on those.

Chairman SIMPSON. With these traveling panels, how often do those panels go on the road, and how frequently do they get to the large regional offices, such as New York or Los Angeles, and how often do they get to the smaller offices, out in the hinterlands, like Cheyenne, Wyo., and places like that?

Mr. SHUMAN. Cheyenne probably once in 18 months, if we go there at all.

Chairman SIMPSON. I am not searching for legislation to see that you go to Cheyenne. I am not for spending——

Mr. SHUMAN. I think sometimes it depends on whether we have any business. New York we do not go to at all. We have an arbitrary rule that if you are within easy commuting distance to Washington, and certainly the Northeast corridor, Metrorail is convenient, the bus is convenient.

So we don't go to New York. California, we visit once a year. The larger offices we visit about once a year. Middle-size offices, every 18 months and the very small offices on an as-needed basis, but not more than once every 2 years.

Chairman SIMPSON. But that is a carefully planned and budgeted operation of your travel?

Mr. SHUMAN. That, sir, we have already planned it out to 1985; yes, it is. And we hear about 500 cases during the course of a year.

We make 12 or 13 trips and visit 30 to 40 offices, Mr. Chairman.

Chairman SIMPSON. On page 6 of your statement you describe the Board's quality evaluation procedure.

Mr. SHUMAN. Yes, sir.

Chairman SIMPSON. If you were to determine in the course of that evaluation that a decision is either not accurate or complete or both, what actions are taken by you, first, to correct the decision and, I suppose, to change the result of that decision.

And, second, to advise the panel. I am concerned about the problems discovered by the quality review procedure.

Mr. SHUMAN. What we do, sir, because the Board members, when they sign a decision, that is the decision of the Board. We are quality reviewing these after signatures have been affixed and decisions have been released.

The best we can do is hold critiques, sometime. We do give them a report as to where they have fallen down in certain items of quality. If a decision is wrong, the only thing we can do is send it back to the Board members, ask them to look at it and see if they are willing to admit their error.

I believe I have the authority to call a case in and have it reconsidered. By that, I mean I would have to use the original panel, plus an additional panel which had not seen the case before.

Then you would have a six-man decision, unless the original Board would vacate the decision on the basis of clear error.

Chairman SIMPSON. You would believe you have that authority?

Mr. SHUMAN. I know I have that authority.

Chairman SIMPSON. I would hope.

Now, back to that issue of status of the chief members under the Civil Service Reform Act.

Was there any Government-wide policy from OPM on the treatment of positions like those of the chief members, that are at least partly judicial officers?

Mr. SHUMAN. When the Civil Service Reform Act was proposed, the then General Counsel was Guy McMichael. We had some preliminary discussions, and we almost felt certain that these people would be excluded. We can make mistakes. We weren't—

Chairman SIMPSON. Yes. Was the VA aware of the actions taken by the Department of Labor to exempt from the merit pay system the members of the Federal Employees Compensation Appeal Board or the Benefits Review Board?

Mr. SHUMAN. I am sure the VA was aware of it. We followed the directive pretty stringently, I'd say, and put the Board members under it.

They do meet certain qualifications as management people, and that's why they were put in. I tried to get an exemption. I went to the Deputy Administrator. We had a grievance on this thing. And at every turn, we were rebuffed.

I think the hearing examiner who heard the grievance recommended that we try to come up with some system that would take the Board—the chief members out of merit pay.

We proposed a system whereby we would put another layer of supervision and take away their supervisory functions over their own attorneys. They didn't like this, and we dropped the proposal.

Chairman SIMPSON. Is this something that really is causing distress among the BVA members? Is it a serious morale factor; are they grouching about it continually? What is the situation?

Mr. SHUMAN. I don't feel the pressure continually. I think they are dissatisfied with it, but I can't say. You know, we're just about coming into the first rating on this thing. I think then we might hear some real complaints.

Chairman SIMPSON. Keep us closely advised on that, would you?

Mr. SHUMAN. I certainly will, Mr. Chairman.

Chairman SIMPSON. Because sometimes there is a very valid situation there, and at other times it's the old business of Washington, D.C., you know, and I didn't get properly recognized, and so on. That can be a problem.

Mr. SHUMAN. Well, I'm sure that my Board members, who are here to testify, may take an opposing view to my feelings.

Chairman SIMPSON. Well, we'll appreciate having that.

There was an analysis on page 5 of the American Bar Association testimony on the projected level of appeals of BVA decisions if judicial review were allowed.

What is your thought about that? I don't know how they intelligently computed that, but do you have any comment on that?

Mr. SHUMAN. That must be Bob Coy's statement, Mr. Chairman.

Chairman SIMPSON. No, the American Bar Association.

Mr. SHUMAN. Oh, I haven't seen the American Bar Association——

Chairman SIMPSON. Submit that in writing for us, please.

Mr. SHUMAN. We'll do that.

[Subsequently, the Board of Veterans' Appeals submitted the following information:]

Question: Would the Board of Veterans Appeals please comment on the statement contained on page 5 of the American Bar Association written presentation that the Veterans Administration prediction of the impact of judicial review of the Federal Courts is unrealistic.

NOTE: The estimate of suits in Federal District Court was based on a figure representing 20% of all decisions denied by the BVA for a given year. This is based on Social Security's experience. Furthermore, we expect that 30% of the suits filed would be remanded to the BVA.

Question: 1. The number of filings rarely is an accurate measure of drain. Many cases routinely are remanded or withdrawn because settled or for other reasons. Cases decided on the merits may be decided summarily, without trial and with lesser impact upon judicial manpower. J. Mashaw et al., Social Security Hearings and Appeals 127 (1978).

Answer: Most of the issues before the Board involves entitlement to service connection or to pension benefits. Because of the all or nothing aspect of this type of adjudication there is no opportunity for settlement.

Question: 2. VA benefits decisions are not forged in the same trial-type crucible as Social Security benefits decisions, thus providing fewer technical or procedural grounds for judicial appeal. Social Security benefits decisions are subject to the trial-type procedures of 5 USC §§ 556 and 557. Under S. 349 VA benefits decisions are specifically exempted.

Answer: It is true there would be fewer technical or procedural grounds for judicial review. However, the medical complexities presented in many of our appeals and the nature of the medical statements contained in the record could afford many opportunities for judicial review.

Question: 3. Of the 23,000 claims rejected by the Board of Veterans Appeals, 20,000 are rejections of routine appeals made without a hearing. If the claimant did not think his case important enough to seek a hearing before the VA board, it would not be likely he would retain counsel and go to court.

Answer: In 1977 the Board denied 23,700 appeals; 26,200 appeals were denied in 1978, 25,500 in 1979 and 24,600 in 1980. Because of the non-adversary nature of VA procedures and the fact that a personal hearing is not necessary, many appeals are resolved without a hearing. Numerous hearings are held in the field but no statistics are available. Therefore no prediction can be made as to the number of suits filed in Federal Courts on the basis of the number of personal hearings.

Question: 4. The typical VA rejected claim does not compare in severity to the typical Social Security rejected claim. In Social Security, the claimant's disability either prevents him from engaging in a gainful occupation or it does not -- he receives disability benefits or he does not. The vast majority of VA rejected claims involve upgrading of previously awarded percentage

disability ratings. The veteran either gets a little more money or he continues to receive the amount he has been receiving. The incentive to litigate in the courts is inevitably less.

Answer: Our experience, for many years, shows that about 41 percent of our appeals are for initial service connection for disabilities, about 24 percent are for increased ratings (percentage degree of disability), and 12 percent for other compensation issues. Therefore, the statement that the vast majority of VA rejected claims involves upgrading of disability rating is not true.

Chairman SIMPSON. Then, if you have an opportunity to look at page 2 of the Paralyzed Veterans of America's testimony, the point is made there, a unique one, I think, that there's a trend toward less experienced and therefore less knowledgeable personnel at all levels of the VA adjudication process, and many employees who joined the agency after World War II are retiring.

Have you noticed that trend at BVA, either by virtue of the drop of quality of decisions by the rating boards or in the membership of the BVA itself?

Mr. SHUMAN. Mr. Chairman, I'll make one analogy. When I came in, all the World War I veterans were getting ready to leave, and the World War II veterans took over, and now we're the experts.

We have Korean veterans working up there; we have folks who are not veterans working. Yes, we are training new people. But we need new people. It takes time to train them. And I don't see a tremendous decrease in the quality of our product.

I don't think you can judge the performance of a regional office by considering the reversal rate of the Board of Veterans' Appeals. I say the level of performance is not reflected in our allowance or reversal rate.

Chairman SIMPSON. One final question. I think it was the VFW's testimony, the suggestion was made there that when a hearing will not be transcribed, the BVA staff assistant who will be preparing the workup of the case should attend the hearing.

What is your reaction to that proposal?

Mr. SHUMAN. I certainly agree. And as far as I know, every hearing that is conducted has a staff attorney present.

Chairman SIMPSON. OK. Thank you very much. There will be other questions submitted by the members, and thank you for being with us this morning.

Mr. SHUMAN. Thank you, Mr. Chairman. It's a real pleasure to be here.

[The response of the Board of Veterans' Appeals to written questions submitted by Hon. Alan Cranston, ranking minority member of the Senate Committee on Veterans' Affairs, follows:]

RESPONSE OF THE BOARD OF VETERANS APPEALS TO WRITTEN QUESTIONS SUBMITTED BY HON.
ALAN CRANSTON, RANKING MINORITY MEMBER OF THE SENATE COMMITTEE ON VETERANS'
AFFAIRS

Question 1. On page 5 of his testimony, Mr. Brinsky of AMVETS suggests that one way to decrease the overall processing time at the B.V.A., other than by adding personnel, would be for the Board to increase its productivity. One suggestion that Mr. Brinsky makes for how this might be done is for the Board to issue a one-line decision refusing to accept jurisdiction on a question as to whether or not new and material evidence had been submitted which would warrant further review of previously decided cases rather than issuing a total new, full opinion.

Question 1A. What percentage of cases before the Board in a particular year would fall into this category of previously adjudicated matters?

Answer 1A. Statistics are not currently available. We are attempting to obtain this report from the decision index. If the report becomes available we will forward it to the committee.

Question 1B. Is this approach feasible?

Answer 1B. There would be little gained in dismissing these types of appeals. The Attorney Adviser and Board Members would still have to thoroughly review the records as to the adequacy of the new evidence. An appellant might feel that the record was superficially reviewed from reading a one-line decision. The completed decision with Findings of Fact and Conclusions of Law ensures an in-depth review of the issues.

Question 1C. Would the approach suggested by Mr. Brinsky substantially reduce the processing time for these cases and, thus, have an effect on the current backlog?

Answer 1C. We do not believe so. The amount of time spent by Staff Attorneys and Board Members in research and review would not be substantially reduced. Attorney dictation time plus the better part of an hour of transcription per decision could be gained. However, one must consider that most of the cases reaching the BVA contain more than one issue. If the appellant raises any issue(s) that are new, the BVA decision must address and respond to it (them).

Question 1D. (If yes as to backlog) could you provide an estimate for the record as to how great the effect on the overall processing time would be?

Answer 1D. See answer to (c) above. Little benefit would be gained from this time-saving procedure.

Question 2. On page 3 of your testimony, you mention that it was decided in 1977 that the Board was required to index and make available to the public its decisions.

Question 2A. Is this index now complete?

Question 2B. How far back in time does it go?

Answer 2A, 2B. The index is complete, and contains decisions on each issue presented to the Board during the period from July 1977, through December 1980. Due to difficulties in the Bid process, the award of a contract for the processing and production of the 1981 index was delayed until this month. A semiannual edition for the period from January through June is now being processed, and we are informed that this will be ready in October. Since February 1981, the AIRS staff has been indexing current decisions, and the information is now being sent for keystroking and processing on a weekly basis.

Question 2C. Where and in what form is the index available?

Answer 2C. The index is available in microfiche form upon request to:

Appellate Index and Retrieval Staff (01C1)
Board of Veterans Appeals
Washington, D.C. 20420

Question 2D. If an individual locates a case in the index, where would he or she locate a copy of the Board's full opinion?

Answer 2D. Each indexed case bears a unique locator number. A copy of the full opinion is available by citing that number in a request to the AIRS staff. In addition, copies of any, or all, of the reels of microfilmed decisions are available by order from Kodak.

Question 2E. If, in the course of an appeal, a claimant references an earlier Board case as supportive of a favorable result in his or her case, does the Board's written opinion, particularly if the appeal is denied, discuss the earlier case and indicate why the Board did not rely on the referenced opinions?

Answer 2E. Yes, if such case were cited.

Question 2F. If the current \$10 limit on attorney's fees in section 3404 of title 38 was modified so that there would be more significant representation of claimants by attorneys, do you believe the demand for the BVA index and earlier opinions would increase significantly and, if it did, would the Board be able to meet this demand?

Answer 2F. We would anticipate an increase in requests for both the index and copies of decisions. Presently, the microfiche index is provided at no charge, and even with a significant increase in demand we believe this policy would continue. However, a significant increase in requests for decision

copies could require additional staff. The Kodak Company presently has intermediary microfilm reels of all decisions for duplication purposes. Copies of the microfilm reels are available through purchase to any individual or association.

Question 3A. Under current law and practice, if a claimant requests an independent medical opinion, does the Board usually secure one?

Answer 3A. More than half the time.

	<u>Requests for IME'S Not Obtained by BVA</u>	<u>Percentage of Total Requests for Opinion</u>
FY 1980	70	24.9
FY 1979	40	15.1
FY 1978	99	33.0
FY 1977	36	17.3

NOTE: Our records on denials of requests may not be complete.

NOTE: The number of IME opinions obtained by the BVA are contained in a prior response.

Question 3B. I am aware that, in cases involving disabilities alleged to be related to exposure to radiation, the Board has quite often requested outside expert opinions. Are you now following, or do you plan to follow, a similar course in cases involving alleged exposure to Agent Orange?

Answer 3B. I am not aware of any BVA resistance to IME submissions in Agent Orange cases on policy or philosophic grounds. However, the current study and contract underway with UCLA is expected to address the major policy issues.

A file of IME opinions would undoubtedly make the case easier to adjudicate. The fact that such an opinion was obtained in a particular case should make the decision easier for the claimant to accept, even if it was adverse.

We are, however, often presented with Agent Orange allegations so vague and tenuous that we have felt that there was no serious medical question to submit to an IME. A recent example:

THE ISSUE

Entitlement to service connection for residuals of Agent Orange exposure, described by the veteran and his representative as being manifested by various symptoms, including numbness of the extremities, diminished sex drive, insomnia, shortness of temper and a tendency towards aggressive behavior.

We feel that to justify IME submission we should have at least (1) a medical diagnosis of a specific chronic disability and (2) a medical opinion or a reference to authoritative medical literature linking such disability to Agent Orange.

A case has recently been referred to an IME. The veteran has claimed service connection for retroperitoneal tumors, headaches and genetic or reproductive organ damage claimed as residuals of Agent Orange exposure. Information is of record that analysis of the veteran's adipose tissue had shown six parts per trillion of dioxin.

Question 4. The American Legion stated in their testimony that providing for judicial review would place the veteran in an "adversary relationship" to the V.A. and that that relationship would require the veteran to "prove his claim" and that "the government must seek to prevent him from doing that". Please state briefly now and in more detail for the record whether, if S. 349 were enacted, you believe that the veteran would have an

increased burden of proof and the V.A. would then have to seek to prevent veterans from proving their claims.

Answer 4. It does not appear that S. 349 would significantly change adjudication procedures, especially those relating to the burden of proof. The concept of resolving reasonable doubt in favor of the appellant certainly would preserve the non-adversary nature of appeals up to and including the final agency decision. The filing of a suit in Federal District Court after the appellant receives an unfavorable BVA decision would at that stage modify the agency relationship to the appellant and place the procedure in a slightly adversary setting.

Question 5A. With respect to the situation involving the placement of B.V.A. Chief Members under the merit pay system, please provide for the record copies of all documents submitted by or on behalf of the Chief members in connection with their efforts to avoid that placement and all documents setting forth decisions or other responses to their submissions.

Answer 5A. See file attached.

Question 5B. On page 10 of your statement, you stated that you decided not to remove significant supervisory duties from the Chief Members and you made that decision "largely due to their reluctance to accept a proposed additional layer of supervision".

Question 5B(i). What do you mean by their "reluctance"? Would or would not the Chief Members actually accept that layer of supervision?

Answer 5B(i) The plan for the creation of four SES Deputy Vice Chairmen would result in four appellate services at the Board. This plan was presented to the Chief Members who objected to the proposed reorganization. They objected to an additional layer of supervision between themselves and Chairman/Vice Chairman. They also did not want to give up direct control over the attorneys assigned to their Section. They ultimately felt that the reorganization would establish too close a supervision over themselves and the Section.

Question 5B(ii). Please describe the additional layer of supervision, why it was considered a necessary part of removing the supervisory duties, and why the Chief Members would object to it.

Answer 5B(ii). In order to exclude Chief Members from merit pay, it is necessary to strip them of supervisory functions. Therefore, the supervisory functions contained in the Chief Members' Position Descriptions would be removed and included in the new Deputy Vice Chairman's Position Description. Examples of these supervisory functions are general supervision of Section attorneys, responsibility for quality and quantity accomplishment in the Section, training of attorneys and application of work measurement techniques.

Question 5B(iii). What, if any, other factors were involved in your decision?

Answer 5B(iii). My decision not to reorganize the Board was based entirely on the wishes of the Chief Members. I personally feel that the plan would have achieved considerable benefits for a nominal cost. Quality control of appellate decisions would be enhanced. Monitoring those Section decisions under the control of the Deputy Vice Chairman would result in greater consistency and uniformity in the resolution of appellate issues. Opportunity for advancement and development of greater expertise would be afforded the Board Members.

Question 6. On page 11 of your testimony, you state, "the Chief Members ... face the possibility of receiving less pay than the Associate Medical and Legal Members who serve in the same Section and are not under merit pay".

Question 6A. Please explain, in specific detail, how this would occur.

Answer 6A. Under merit pay, a Chief Member would receive only one-half of the annual comparability salary increase. The Legal and Medical Members would receive full annual comparability salary provided they were evaluated satisfactory. The Chief Members' entitlement to the remaining comparability increase would depend upon the personal evaluation and the amount of funds assigned to the GS-15 Merit Pay Pool. It may be necessary for a Chief Member to receive a higher than satisfactory evaluation in order to receive the remaining comparability.

Question 6B. Do you believe that it would be equitable and wise for a Chief Member, as a result of being placed under merit pay system, to receive less than the other Members?

Answer 6B. No.

Question 6C. In your opinion, do the differences that you discuss, on page 11, in the roles and functions of administrative law judges and B.V.A. Members weigh in favor of exempting B.V.A. Chief Members from merit pay?

Answer 6C. The purpose of discussing the differences in the roles and functions of administrative law judges and Board of Veterans Appeals Members was not to favor or disfavor exemption from merit pay. If the committee should consider legislation exempting Chief Members from merit pay I would prefer that such legislation specifically exempt them from chapter 54 of title 5, United States Code. To establish a "quasi administrative law judge" status would confuse the position of Board Members and play down their centralized final decision-making authority.



Veterans Administration

REFERENCE SLIP

TO (Name or title—Mail routing symbol)		INITIALS-DATE
1.	01 ✓ Ken Fenton 10	
2.	02 20	
3.	04 30	
4.	08 40	
5.		

REASON FOR REFERENCE		
☐ AS REQUESTED	☐ FOR YOUR FILES	☐ NOTE AND RETURN
☐ COMMENTS	☐ INFORMATION	☐ PER CONVERSATION
☐ CONCURRENCE	☐ NECESSARY ACTION	☐ SIGNATURE

REMARKS

Attached for your review and concurrence are the proposed performance appraisal forms for non-merit pay supervisors and nonsupervisors.

These forms capture the essential information necessary to complete the performance appraisal process. There have been some refinements made to the forms as a result of our experience gained from the Merit Pay trial period.

We would appreciate receiving your concurrence by July 24, 1981.

Attachments

FROM

MICHAEL RUDD

for Acting Assistant Administrator
for Personnel (05)

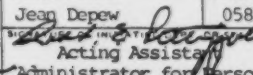
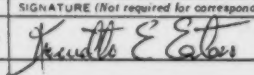
DATE

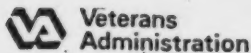
JUL 17 1981

TEL. EXT.

VA FORM
MAY 1980 3230

EXISTING STOCKS OF VA FORM 3230,
AUG 1978, WILL BE USED.

SUMMARY SHEET				FROM (Dept. or staff office)		DATE	
SUBJECT Performance Appraisal Forms				05		JUL 17 1981	
				NAME OF CONTACT		SYMBOL	
				Jean Depew		058A	
				EXTENSION		3793	
				SIGNATURE IN TITLE OF CONTACTS HEAD  Acting Assistant Administrator for Personnel			
CONCURRENCE							
TO	SYMBOL	DATE OUT	SIGNATURE (Not required for correspondence)	TO	SYMBOL	DATE OUT	SIGNATURE (Not required for correspondence)
1	01	7/20/81		5	10		
2	02			6	20		
3	04			7	30		
4	08			8	40		
PURPOSE - DISCUSSION - OPTIONS - RECOMMENDATIONS							
<u>PURPOSE</u>: To provide a standard VA form for evaluating employee performance in accordance with the Civil Service Reform Act of 1978. <u>DISCUSSION</u>: Office of Personnel Management Regulations require that critical elements and performance standards and periodic appraisals shall be in writing for all employees. The attached forms will be utilized to communicate performance standards and evaluate all non-SES, non-merit pay employees. The forms use the same terms, and follow the same format as the appraisal form for SES employees (VAF 5-3482) and Merit Pay employees (VAF 5-3482a). <u>OPTIONS</u>: None. <u>RECOMMENDATIONS</u>: It is recommended that the two proposed appraisal forms for supervisors (VAF 5-3482b) and non-supervisors (VAF 5-3482c) be approved.							
ACTION BY OFFICE OF THE ADMINISTRATOR							
00A		DATE		SIGNATURE			
☐ APPROVED ☐ DISAPPROVED							



Performance Appraisal

For

GREEN

Supervisory Employees

USE NFE, Form 2, 1-1-64 (Rev. 4-1-61)

APPRAISAL OF		
EMPLOYEE'S NAME (Last, First, Middle Initial)	SOCIAL SECURITY NO.	GRADE/STEP/SALARY
POSITION TITLE AND SERIES	DATE ASSIGNED PRESENT POSITION	
DEPARTMENT/OFFICE	SERVICE/DIVISION	LOCATION
RATING PERIOD		
FROM	TO	
PERFORMANCE PLAN COMMUNICATED		
DATE COMMUNICATED	SIGNATURE OF SUPERVISOR	SIGNATURE OF EMPLOYEE

The purpose of this form is to provide a standard framework for evaluating the performance of supervisory employees based on objective criteria to the extent feasible for the job in question, and to communicate to the employee the performance requirements upon which he/she will be evaluated during the appraisal period.

When developing the performance plan and describing/rating actual achievement, consideration will be given to both individual performance and organization accomplishment taking into account such factors as: improvements in efficiency, productivity and quality of work or service, including any significant reduction in paperwork; cost efficiency; timeliness of performance; other indications of the effectiveness, productivity and performance quality of the employees for whom the employee is responsible; meeting affirmative action goals and achievements of equal employment opportunity requirements, to the extent the employee's position involves such responsibilities. Agency priority goals and issues can also be expressed as performance standards as appropriate.

The results of this performance appraisal may be used as a basis for other personnel management actions to include training, promotions, rewards, reassignments, and removals.

SECTION A - PERFORMANCE PLANNING						
KEY RESPONSIBILITIES/ List major components of this job below. Asterisk the component(s) considered the CRITICAL ELEMENT defined as the key responsibility (ies) sufficiently important that inadequate performance of it outweighs acceptable or better performance in other components of the job.)	ORGANIZATIONAL/INDIVIDUAL PERFORMANCE STANDARDS AND/OR RESULTS BE ACHIEVED (Specific statements of employee's key responsibilities which can be reasonably achieved and measured during the rating period. If added weight is given to performance standards designate it by underlining. Clearly indicate within the written performance standards two levels of achievement - Met and Far Exceeded)					
CHANGES IN PERFORMANCE PLAN (Note Key Responsibility Time, Performance Standard Number and Date of Change)						
PERFORMANCE PLAN/REVIEWS	SUPERVISOR'S INITIALS	EMPLOYEE'S INITIALS	DATE	SUPERVISOR'S INITIALS	EMPLOYEE'S INITIALS	DATE

NARRATIVE SUMMARY. This section requires you to summarize your overall evaluation of the employee's performance and comment on the supervisory skills demonstrated during the rating period. (Leadership, the ability to plan, organize, delegate, develop and motivate subordinates, effective use of time, promoting cooperation, making decisions, improving procedures and systems, etc.) Also comment on capacity to assume a more responsible position.

Section C - Overall Ratings

Check the rating which describes this employee's overall performance during the appraisal period. The individual levels of achievement for each Key Responsibility as designated in Section B will determine the Overall Rating as follows:

- ☐ Outstanding - All levels of achievement for each Key Responsibility are designated as Far Exceeded.
- ☐ Highly Satisfactory - All levels of achievement for each Key Responsibility must at least be designated as Exceeded. Some may be designated as Far Exceeded.
- ☐ Fully Satisfactory - All levels of achievement for each Key Responsibility must at least be designated as Met. Some levels of achievement may be designated Exceeded and/or Far Exceeded.
- ☐ Minimally Satisfactory (Marginal) - All levels of achievement for Key Responsibility(ies) designated as critical element(s) are Met. However, levels of achievement of one or more non-critical Key Responsibility(ies) are not met.
- ☐ Unsatisfactory - Failed to meet the level of achievement of one or more Key Responsibilities designated as critical.

NOTE: If the overall rating is not consistent with the levels of achievement checked in Section B, attach a detailed explanation for the discrepancy.

FREQUENCY AND TYPE OF CONTACT	SIGNATURE AND TITLE OF RATER	DATE
EMPLOYEE REVIEW		
☐ I wish to provide a written response. <i>(if desired)</i>		
☐ I do not wish to respond.		
SIGNATURE OF EMPLOYEE		DATE
HIGHER LEVEL REVIEW/APPROVAL		
ACTION		
☐ Concur with rating		
☐ Do not concur with rating - Approve rating of		
BASIS FOR RATING CHANGE / ADDITIONAL COMMENTS		
SIGNATURE AND TITLE OF APPROVING OFFICIAL		DATE



Veterans
Administration

Performance Appraisal

For

Non-Supervisory Employees

SAL 1/1/1

APPRAISAL OF		
EMPLOYEE'S NAME (Last, First, Middle Initial)	SOCIAL SECURITY NO.	GRADE/STEP/SALARY
POSITION/TITLE AND SERIES	DATE ASSIGNED/ANALYST POSITION	
DEPARTMENT/OFFICE	SERVICE/DIVISION	LOCATION
RATING PERIOD		
PER	TC	
PERFORMANCE PLAN COMMUNICATION		
DATE COMMUNICATED	Signature of SUPERVISOR	Signature of EMPLOYEE

The purpose of this form is to provide a standard framework for evaluating the performance of non-supervisory employees based on objective criteria to the extent feasible for the job in question and to communicate to the employee the performance requirements upon which he/she will be evaluated during the appraisal period.

When developing the performance plan and describing/rating actual achievement, consideration will be given to individual performance taking into account such factors as: efficiency, productivity and quality of work or service, including any significant reduction in paperwork; cost efficiency and timeliness of performance.

The results of this performance appraisal may be used as a basis for other personnel management actions to include training, promotions, rewards, reassignments and removals.

VA FORM 5-3000

SECTION A - PERFORMANCE PLANNING

KEY RESPONSIBILITIES/TASKS List major components of this job below. Asterisk the component(s) considered the CRITICAL ELEMENT defined as the key responsibility (ies)/task(s) sufficiently important that inadequate performance of it outweighs acceptable or better performance in other components of the job.)

ORGANIZATIONAL/INDIVIDUAL PERFORMANCE STANDARDS AND/OR RESULTS TO BE ACHIEVED (Specific statements of employee's key responsibilities which can be reasonably achieved and measured during the rating period. If added weight is given to performance standard, designate it by underlining. Clearly indicate within the written performance standards two levels of achievement - Met and Far Exceed.)

CHANGES IN PERFORMANCE PLAN (NOTE Key Responsibility Title, Performance Standard Number and date of change)

PERFORMANCE PLAN REVIEWS	SUPERVISOR'S INITIALS	EMPLOYEE'S INITIALS	DATE	SUPERVISOR'S INITIALS	EMPLOYEE'S INITIALS	DATE

SECTION B - ACTUAL ACHIEVEMENT

LEVEL OF
ACHIEVEMENT

Describe actual performance in detail as it relates to each performance standard in Section A. These descriptions of performance are considered as a whole and ONLY one level of achievement is assigned for each Key Responsibility/Task.

	LEVEL OF ACHIEVEMENT			
	EXCEEDED	MEET	NEARLY MET	NOT MET

ADDITIONAL SIGNIFICANT ACCOMPLISHMENTS

Additional Narrative Comments on Performance (Optional)

Section C - Overall Ratings

Check the rating which describes this employee's overall performance during the appraisal period. The individual levels of achievement for each Key Responsibility as designated in Section B will determine the Overall Rating as follows:

- ☐ Outstanding - All levels of achievement for each Key Responsibility/Task are designated as Far Exceeded.
- ☐ Highly Satisfactory - All levels of achievement for each Key Responsibility/Task must at least be designated as Exceeded. Some may be designated as Far Exceeded.
- ☐ Fully Satisfactory - All levels of achievement for each Key Responsibility/Task must at least be designated as Met. Some levels of achievement may be designated Exceeded and/or Far Exceeded.
- ☐ Minimally Satisfactory (Marginal) - All levels of achievement for Key Responsibility(ies)/Task(s) designated as critical element(s) are Met. However, levels of achievement of one or more non-critical Key Responsibility(ies)/Task(s) are not met.
- ☐ Unsatisfactory - Failed to meet the level of achievement of one or more Key Responsibilities designated as critical.

NOTE: If the overall rating is not consistent with the levels of achievement checked in Section B, attach a detailed explanation for the discrepancy.

FREQUENCY AND TYPE OF CONTACT	SIGNATURE AND TITLE OF RATER	DATE
-------------------------------	------------------------------	------

EMPLOYEE REVIEW ☐ I wish to provide a written response. ☒ I do not wish to respond.	
SIGNATURE OF EMPLOYEE	DATE

HIGHER LEVEL REVIEW/APPROVAL	
ACTION ☐ Concur with rating ☐ Do not concur with rating - Approve rating of _____	
BASIS FOR RATING CHANGE / COMMENTS	

SIGNATURE AND TITLE OF APPROVING OFFICIAL	DATE
---	------

General Counsel (022)

July 2, 1981

Merit Pay Exclusion for Chief Members
of the Board of Veterans Appeals

1. Your office has a copy of the Chief Members' grievance concerning their inclusion in merit pay. In August 1980 the Deputy Administrator determined that their position met the statutory definition of supervisor but not of management officials. He directed the Chairman of the Board of Veterans Appeals to explore the feasibility of removing supervisory duties from their position. He further recommended that the Administrator apply to OPM for an exclusion. Following discussion with the Chief Members, the Chairman found that it was not feasible to remove supervisory duties from the position. Representatives of Personnel felt that an application to OPM would be futile.
2. The only remaining remedy appears to be Legislation. I suggest that 38 U.S.C. 4001(a) be modified by inserting a sentence specifically excluding the Members from Chapter 54, United States Code of title 5. This would be preferable to equating the Members to Administrative Law Judges and should not adversely affect the management operation of the Board of Veterans Appeals.

SYDNEY J. SHUMAN
Chairman, Board of
Veterans Appeals (01C)

VETERANS ADMINISTRATION
Washington, D.C. 20420

INTERIM ISSUE 00-80-23
Supplement #1

*for new merit
plan*

A. BASIC ADMINISTRATIVE ISSUES AFFECTED: MP-5, Part I, Chapter 430.

B. OTHER ISSUES AFFECTED: None.

C. REASON FOR ISSUE: To amend agency policy on performance appraisal in accordance with the requirements of FPM Letter 430-4, dated March 19, 1981, and to extend the rescission date of Interim Issue 00-80-23. Interim Issue 00-80-23, dated October 17, 1980 should be amended accordingly.

D. TEXT OF ISSUE

1. General. FPM Letter 430-4 requires that a performance rating on any standard cannot be extrapolated more than one level above or below the level for which there is a written standard. The VA performance appraisal system as previously approved by the Office of Personnel Management contained four levels of performance against a single standard: Far Exceeded, Exceeded, Met, (the level at which the standard was written) and Not Met. As the Far Exceeded level of performance measurement is two levels above the written standard, the Office of Personnel Management requires that the level of performance for Far Exceeded must also be written as well as the Met (or acceptable) level.

2. Policy. The agency performance appraisal process will involve setting performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria related to the job in question. Performance standards will be written at two levels: the Met (or acceptable) level and the Far Exceeded (or outstanding) level.

This policy is effective with the appraisal period that begins on or after October 1, 1981. If the Far Exceeded level cannot be initially developed by the beginning of the appraisal period because of time constraints created by this change, it is permissible to add it to performance plans during the appraisal period, as long as it is added no later than ninety (90) days after the beginning date of the appraisal period. (January 1, 1982).

Local management should meet their labor relations responsibilities when implementing this interim issue.

E. RESCISSION: Interim Issue 00-80-23 and supplement is extended until June 30, 1982.

DONALD L. CUSTIS, M.D.
Acting Administrator

Distribution: RPC: 5020
FD

VETERANS ADMINISTRATION
Washington, D.C. 20420

INTERIM ISSUE 00-80-25
Supplement #2

for merit pay

A. BASIC ADMINISTRATIVE ISSUES AFFECTED: MP-5, Part I, Chapter 540.

B. OTHER ISSUES AFFECTED: None.

C. REASON FOR ISSUE: To amend agency policy on performance appraisal in accordance with the requirements of FPM Letter 430-4, dated March 19, 1981. That FPM Letter requires that a performance rating on any standard cannot be extrapolated more than one level above or below the level for which there is a written standard. Interim Issue 00-80-25, dated November 25, 1980 should be amended accordingly.

D. TEXT OF ISSUE

1. General. The VA performance appraisal system as previously approved by the Office of Personnel Management contained four levels of performance against a single standard: Far Exceeded, Exceeded, Met, (the level at which the standard was written) and Not Met. As the Far Exceeded level of performance measurement is two levels above the written standard, the Office of Personnel Management requires that the level of performance for Far Exceeded must also be written as well as the Met (or acceptable) level.

2. Policy. The agency performance appraisal process will involve setting performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria related to the job in question. Performance standards will be written at two levels: the Met (or acceptable) level and the Far Exceeded (or outstanding) level.

This policy is effective with the appraisal period that begins on August 1, 1981. For non-Merit Pay Division/Service Chiefs and Equivalent, this is also effective August 1, 1981. If the Far Exceeded level cannot be initially developed by the beginning of the appraisal period because of time constraints created by this change, it is permissible to add it to performance plans during the appraisal period, as long as it is added no later than ninety (90) days after the beginning date of the appraisal period. (November 1, 1980).

E. RESCISSION: This Interim Issue expires June 1, 1982.

DONALD L. CUSTIS, M.D.
Acting Administrator

Distribution: RPC: 5031
FD

SUMMARY SHEET				FROM: (Dept. or Staff Office)		DATE			
SUBJECT Interim Issue 00-81- , MP-5, Part I, Chapter 540, Merit Pay System, Section B, Performance Appraisal				AA/P (05)					
				NAME OF CONTACT		SYMBOL		EXTENSION	
				John B. Haltigan		058A		3793	
				SIGNATURE OF INITIATING DEPT. OR STAFF OFFICE HEAD					
				MICHAEL RUDD <i>Michael Rudd</i>					
CONCURRENCES									
TO	SYMBOL	DATE OUT	SIGNATURE (Not required for correspondence)	TO	SYMBOL	DATE OUT	SIGNATURE (Not required for correspondence)		
1	01	6/16/81	<i>X E Eaton</i>	5	10				
2	02			6	20				
3	04			7	30				
4	08			8	40				
PURPOSE - DISCUSSION - OPTIONS - RECOMMENDATIONS									
PURPOSE: To provide instructions and guidelines to operating officials for concluding the first performance appraisal period for Merit Pay employees (GS 13-15 supervisors and managers). DISCUSSION: The first performance appraisal period for all Merit Pay employees began October 1, 1980 and will conclude this July 31, 1981. The policies and procedures pertaining to performance appraisal for Merit Pay employees were issued in Interim Issue 00-80-25, dated November 24, 1980. This proposed interim issue will provide additional instructions and highlight the importance of rating and reviewing officials strictly adhering to the procedures and timetables in order for the merit pay increases to be correct and timely. The merit pay increases are directly linked to the official performance evaluation and will be processed early October of this year. OPTIONS: None.									
ACTION BY OFFICE OF THE ADMINISTRATOR									
00A		DATE		SIGNATURE					
☐ APPROVED ☐ DISAPPROVED									

VETERANS ADMINISTRATION
Washington, D.C. 20420

INTERIM ISSUE 00-81-

- A. BASIC ADMINISTRATIVE ISSUE AFFECTED: MP-5, Part I, Chapter 540, Merit Pay System, Section B, presently published as Interim Issue 00-80-25.
- B. REASON FOR ISSUE: To provide additional instructions and guidance for concluding the performance appraisal period of Merit Pay Employees (GS 13-15 Supervisors and Managers) which covers the period October 1, 1980 through July 31, 1981.
- C. TEXT OF ISSUE:

1. Performance appraisal policy and procedures for Merit Pay employees were outlined in Interim Issue 00-80-25 dated November 24, 1980. Paragraph 6 of that Interim Issue describes the procedures all supervisors must follow in documenting and completing the Merit Pay performance appraisal form, VAF 5-3482a.

2. In order for the merit pay increases to be both correct and timely, it is essential that the procedures and dates specified in Interim Issue 00-80-25 be adhered to by all rating and reviewing officials. Supervisors should inform their merit pay employees within five days of the completion of the rating period that they may elect to submit a self-assessment of their performance. If completed, these should be forwarded to rating officials by August 12, 1981. Completion of a self-assessment is not mandatory. Rating officials should complete VA Form 5-3482a and assign an overall rating by August 20, 1981. The employee being rated will review the appraisal and recommended rating, sign the form, and have an opportunity to respond in writing to the appraisal and rating before it is forwarded to the higher level Review/Approval Official. The Review Official should approve all ratings by September 1, 1981. The completed Merit Pay performance appraisal form VAF 5-3482a must be forwarded to the servicing personnel office by September 10, 1981 for processing. As soon as possible after September 10, 1981, a copy of the appraisal form should be provided to the employee.

3. There will be many merit pay employees whose rating and/or reviewing official are located at other field offices or in VACO. Care should be taken to see that appraisal forms and any self-assessments submitted are forwarded to these officials as soon as possible, so that the approved ratings are known to the servicing personnel offices for final processing no later than September 10, 1981.

4. Employees who have been initially appointed in a Merit Pay position, or reassigned from a non-merit pay position into a Merit Pay position after May 3, 1981 will not be rated. Such employees will be presumed to be fully satisfactory. Employees who are promoted from a non-merit pay position to a merit pay position, or promoted from one merit pay position to another after May 3, 1981 will also not be rated, and will be presumed to be fully satisfactory. Employees who are promoted or reassigned from one merit pay position to another merit pay position prior to May 3 will be jointly rated

by the current and previous supervisor as long as they were under the previous supervisor for at least 90 days. The overall rating will be assigned by the present supervisor who will use as a source of information a summary appraisal from the previous supervisor. Employees who are reassigned from one merit pay position to another merit pay position after May 3, will be rated only in their previous position.

5. The performance evaluation and resulting official rating as documented on VA Form 5-3482a will form the direct link with the merit pay increase that will be given this October. For the merit pay process to be successful all raters and reviewers must carry out the evaluation process in a highly responsible manner. Actual achievement documented on the form should be both sufficient and specific enough to support levels of achievement indicated for each key responsibility of the subordinate's job. Descriptions of actual achievement should relate directly to the pre-established performance standards.

6. There may be instances when an employee deserves an outstanding or highly satisfactory rating even though he or she failed to far exceed or exceed, respectively, all key responsibilities. When this happens, the rating official must document, on the performance appraisal rating form, or as an attachment, the reasons for assigning the higher rating, explaining why the higher rating was given. Approving officials will assure that explanations are adequate and should not approve ratings which are not justified by the evaluation.

7. While there are only five official performance ratings, for the purpose of making merit pay salary determinations, those employees who are rated FULLY SATISFACTORY but who have exceeded a majority of their key responsibilities will have a separate PAID code. This will assure that employees who did more than just meet their key responsibilities will receive more compensation even though they are rated only FULLY SATISFACTORY. Rating officials will place an asterisk above the FULLY SATISFACTORY block for those employees who are rated FULLY SATISFACTORY but who exceeded the majority of their key responsibilities.

8. August 1, 1981 begins the second appraisal cycle for all Merit Pay employees and Service/Division Chiefs regardless of grade. Supervisors should assure that performance plans are documented on either VA Form 5-3482a or 5-3482b as appropriate and are communicated to their subordinates by the beginning of this second appraisal period. The appraisal period will be from August 1, 1981 through July 31, 1982.

D. EXPIRATION DATE: December 31, 1981.

DONALD L. CUSTIS, M.D.
Acting Administrator

Distribution: RPC: 5031
FD

Per. 6

Deputy Assistant General Counsel (022A)

SUBJ: Merit Pay--BVA Chief Members' Grievance

Pursuant to your request, attached please find a copy of our file with respect to the Chief Members' merit pay grievance.

Attachment

JAN DONSBACH (01C)
Special (Legal) Assistant to the
Chairman, BVA

5/4/81

2978

DAAbbott

5/4/81

01C

Jan: 7-11
UNITED STATES GOVERNMENT

Memorandum

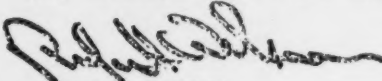
DATE AUG 8 - 1980

TO Chief Members, Board of Veterans Appeals (011F)
THRU: Chairman, Board of Veterans Appeals (01)

FROM Deputy Administrator (001)

SUBJ: Group Grievance

1. I have carefully reviewed the report of findings and recommendations submitted by William M. Rickman, Grievance Examiner, along with the entire grievance file. It is my decision to adopt the recommendations made in the report.
2. Accordingly, it is my determination that your positions meet the statutory definition of supervisor. You are thus covered by the merit pay system. However, they do not meet the definition of management official.
3. The Chairman, Board of Veterans Appeals, will explore the feasibility of removing supervisory duties from your positions and assigning them elsewhere. If he determines that this is not feasible, I will recommend to the Administrator that application be made pursuant to 5 USC 5401(b)(2)(C) for exclusion from merit pay coverage under 5 USC 5401(b)(2)(A)(iii).



RUFUS H. WILSON

UNITED STATES GOVERNMENT

Memorandum

DATE: July 21, 1980

TO: Deputy Administrator (001)

FROM: Chief Members, Board of Veterans Appeals
 VIA: (1) Chairman, Board of Veterans Appeals (01) - *for file - kir*
 (2) Assistant Administrator for Personnel (05)
 SUBJ: Chief Members Grievance

1. More than five months have elapsed since we, the Chief Members, initiated informal grievance procedure on February 13, 1980. MP-5, Chapter 771, Section C, Paragraph 2d states that the Agency is to complete the entire grievance process - from initiation of informal grievance procedure to issuance of a decision - within three months (90 calendar days).
2. We filed our formal grievance petition on February 21, 1980. Agency Regulations state that an examiner is to be appointed within ten calendar days of the filing of the formal grievance. It was not until May 2, 1980, that an examiner was appointed to conduct an inquiry. Regulations further state that the examiner is to conclude his inquiry and submit his report within 45 calendar days. We did not receive his report until July 3, 1980.
3. We are gratified that the examiner recommended specific action to have us excluded from the provisions of the Merit Pay System. MP-5, Chapter 771, Section C, Paragraph 11 states that a decision is to be issued within 15 calendar days after receipt of the examiner's recommendation. This time limit has now expired and we still have not received an Agency Decision.
4. We tried to emphasize in our grievance petition and during the course of the examiner's inquiry that this is a matter of great importance to us and that it is adversely affecting morale. We respectfully request an estimate as to when we can expect to receive the detailed, written decision provided for in the Agency Regulations.

G. Troiano
 G. TROIANO, on behalf of
 all Chief Members

Advance copy:
 Deputy Administrator (001)



Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

VA FORM 2165
JAN 1977

WILLIAM M. RICKMAN
9680 119TH WAY NORTH
SEMINOLE, FLORIDA 33542

*Copy for
File*

June 27, 1980

Mr. Rufus H. Wilson
Deputy Administrator for
Veterans Affairs
Veterans Administration
Washington, D. C. 20420

Dear Mr. Wilson:

Enclosed is my report of findings and recommendations in the matter of
GENEROSO TROIANO et al, 16 grievants, Board of Veterans Appeals.

I will appreciate receiving a copy of your decision in this matter
when it is issued.

Sincerely yours,

William M. Rickman
WILLIAM M. RICKMAN
Grievance Examiner

cc: Mr. Troiane, representative ✓
Mr. Clark, A/AP

FORMAL GRIEVANCE

(16 GRIEVANTS)

GENEROSO TROIANO, ET AL.

VETERANS ADMINISTRATION

CENTRAL OFFICE

WASHINGTON, D. C.

FINDINGS AND RECOMMENDATIONS

ISSUED BY: WILLIAM M. RICKMAN
GRIEVANCE EXAMINER

DATE: JUNE 27, 1980

FORMAL GRIEVANCE: GENEROSO TROIANO ET AL. *

INQUIRY AT: Washington, D. C.
INQUIRY ON: May 12-16; 29, 30, 1980
INQUIRY BY: WILLIAM M. RICKMAN
GRIEVANCE EXAMINER
ENCLOSURES: (1) INFORMAL STAGE FILE
(2) STATEMENTS TAKEN - FORMAL STAGE
(3) DOCUMENTS ACCEPTED - FORMAL STAGE

*GRIEVANTS: Generoso Troiano; Lewis P.
Summers, III; Woodrow B. Morris; James J.
Butler; Bruce E. Hyman; David T. Landers;
Elizabeth F. Parris; Richard B. Standefer;
Daniel J. B. Bierman; Rae T. Wood; Roger K. Bauer;
Samuel W. Warner; Kenneth J. Wells; Charles D.
Romo; Craig P. Russell; Romulus A. Picciotti.

INTRODUCTION

This formal inquiry was conducted pursuant to the provisions of Veterans Administration MP-5, Part I, Chapter 771, dated August 2, 1971, under appointment by the Veterans Administration Central Office, dated May 2, 1980.

The formal inquiry was requested by the Assistant Administrator for Personnel, Veterans Administration, as the next step in the processing of an unresolved grievance filed by the sixteen Chief Members of the Board of Veterans Appeals (BVA), in response to a determination by the Chairman, BVA, that the Chief Members fell within the coverage of the Merit Pay System of the Civil Service Reform Act of 1978.

Agency Chapter 771 provides (at C 10, p. C-5) that a formal grievance inquiry may be conducted by means of:

- (1) The securing of documentary evidence;
- (2) Personal interview;
- (3) A group meeting;
- (4) A hearing; or
- (5) Any combination of (1) through (4) of this subparagraph.

The examiner elected a combination of options (1) and (2). Option (2) provides that statements "should" be taken under oath, without a pledge of confidence. However, because the examiner found no issue requiring a credibility assessment, he followed a more informal and expeditious practice of accepting signed (but unsworn) statements from all interested parties. Specifically, after statements from several Chief Members, all remaining grievants were advised that they might, on their own initiative, submit statements through their group representative, Mr. Troiano (none submitted statements). Also, five staff attorneys were requested to furnish (and did furnish) statements regarding their perceptions of the degree of control, guidance, direction, or oversight (if any) exercised by the Chief Members vis a vis them in their performance and day-to-day job activities. A statement was also taken from the Acting Vice Chairman, BVA. (In a brief interview, the Chairman stated that he would stand by his statements in the record.)

The total record has been fully reviewed and considered by the examiner in reaching the findings and recommendations set out below. In addition, for the reason explained below, the examiner conducted extensive research in the field of labor-management relations to ascertain what precedents and/or determinations exist which are relevant to the matter at issue in this case.

ISSUES CONSIDERED

Whether the Chief Members, Board of Veterans Appeals, are "supervisors" or "management officials" within the meaning of 5 U.S.C. 7103 a. (10) or (11).

BACKGROUND

By letter dated December 3, 1979, each Chief Member was notified by C. H. Eight, then Vice Chairman, EVA, that a determination had been made that his/her position should be included in the Merit Pay System "because it meets the definitions for supervision/manager under the Supervisory Grade Evaluation Guide/Labor Management Relations Definitions." Each was advised of a right to request reconsideration of this determination, and such request was made. By undated memorandum received December 18, 1979, the Chairman, EVA, advised that, after reconsideration, he had concluded that "your position fully meets the definitions of Management Official in Title VII of the Civil Service Reform Act and Supervisor under the Labor Relations definition and must be covered by the Merit Pay System."

By memorandum dated December 18, 1979, the Chief Members notified the Assistant Administrator for Personnel of their intention to pursue this matter through agency grievance procedures. On February 5, 1980, the Acting Assistant Administrator for Personnel advised that, having pursued the informal proceeding through the Chairman, BVA, the Chief Members might pursue a formal grievance to the Deputy Administrator. The Chief Members filed such a formal grievance by memo dated March 10, 1980. Thereafter, as noted above, this examiner was appointed to conduct appropriate inquiry and to furnish findings and recommendations to the Deputy Administrator.

ANALYSIS AND FINDINGS

a. "Supervisor"

Title V, Civil Service Reform Act of 1978, (P.L. 95-495) "Merit Pay," added to Title 5, U.S. Code, Chapter 54 which, at sec. 5401 (b) (1) provides that:

Except as provided in paragraph (2) of this subsection [Presidential exclusion] this chapter shall apply to any supervisor or management official (as defined in paragraphs (10) and (11) of section 7103 of this title respectively) who is in a position which is in GS-13, 14, or 15 of the General Schedule described in section 3104 of this title. [Emphasis added]

Title VII of the Reform Act "Federal Service Labor-Management Relations," amended subchapter of the existing Chapter 71 of Title 5. Therein, at sec. 7103 (a) (10), (11), "supervisor" and "management official" are defined, in pertinent part, as follows:

- (10) 'supervisor' means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment.....
- (11) 'management official' means an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency.....

At this point it should be noted that the grievants have taken exception to reliance on the labor-management definition of "supervisor" in determining their status. The examiner finds that his determination must be made by reference to 5 U.S.C. 7103 a (10).

The incorporation by reference of a sec. 7103 (labor-management) definition into section 5401 (Civil Service Merit Pay System) clearly implies that established labor-management criteria (in lieu of, or beyond, classic civil service personnel criteria) provide appropriate guidance to a determination of the applicability of sec. 7103 definitions to civil service employees. This implication is made

explicit in Federal Personnel Manual Bulletin 540-1, issued by the Office of Personnel Management on February 22, 1979, (Attachment 3, General Guidelines, paragraph c).

At the same time, in the following paragraph, d., the Bulletin adds:

In making determinations for coverage under merit pay, agencies should examine the actual duties and responsibilities assigned to the employee rather than job titles or written job description which may not be up to date. Job titles may be misleading if the individual, who is called a "supervisor," actually directs the activities of a function rather than supervising other employees.....

Accordingly, the examiner concludes that he is not strictly bound by the wording of the Chief Members' official job description either as to title (Supervisory Attorney, Examiner (veterans), or by that job description's citation of duties and responsibilities. The examiner has inter alia considered the history of the Chief Members' positions, as well as the responsibilities and duties as actually performed in reaching a conclusion whether they are "supervisors" or "management officials," within the meaning of 5 U.S.C. 7103 (a) (10), (11), and so subject to the Merit Pay System.

An examination of the history of the Merit Pay System provisions of the Civil Service Reform Act of 1978 discloses that the original Senate Bill 2640 defined coverage thereunder or relating to "any employee in a position which regularly requires the exercise of managerial or supervisory responsibilities" in the grades of GS-13, 14, or 15. The relative vagueness of this definition is apparent. At least the final version referencing sec. 7103 a. (10), (11) had the virtue of being essentially the same definition as is found in Federal labor-management relations Executive Order 11491.¹ That definition has behind it a body of interpretation and

1. E.O. 11491, sec. 2 (c) (as amended): "'supervisor' means an employee having authority, in the interest of the agency, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment..." The Reform Act definition was substantively changed only by the addition of a partial exemption for nurses and firefighters (two groups who, apparently, had sufficient Congressional clout to receive special treatment). Par. 4.b. of the grievance memo argument for an inclusion by reference of this exclusionary reference into the main body of section 7103 a. (10) is without merit, the intentional limitation of the reference being clear on its face.

precedent from which guidance may be found in the instant case.

In 1975, E.O. 11491 was amended; ^{1a} inter alia sec. 2 (c) was amended to delete evaluation of performance as a supervisory factor. The Report and Recommendations of the Federal Labor Relations Council which accompanied ^{the amendments stated} that a variety of proposals had been received to narrow the definition of "supervisor" because it was resulting in the exclusion from bargaining units of employees who were only "work leaders." The principal cause of this exclusion, it was stated, involved the preparation of performance evaluations. The council therefore recommended deletion of this criterion, on the basis that preparation of such evaluation alone was not sufficient to make an employee a "supervisor", although such preparation was a factor to be considered along with others. The Council specifically declined to recommend that the definition be made to conform to other uses, such as in position classification.

The examiner reviewed at the Central Office, Division of Personnel, the EVA Union Recognition file to ascertain what determination currently prevails with respect to EVA employees. That file disclosed that by letter dated August 26, 1969, AFGE Lodge 1 was notified in pertinent part as follows:

The unit is composed of all non-supervisory Attorney-Advisers in the Board of Veterans Appeals, except Associate Members and those attorneys on the immediate staff of the Board Chairman.

The record contains no challenge to, or change in the EVA's recognition status from that set out above. With respect thereto, the examiner finds that this 1969 determination, even disregarding EVA changes and labor-relations executive order changes in the interim, is an intragency administrative determination with no precedent value.

With respect to the position description for Supervisory Attorney Examiner (Veterans), GS-905-15, the examiner finds no prima facie indication that the Chairman's statement in either the reconsideration decision or the February 25th memorandum was incorrect. The grievants, however, in their formal grievance memorandum of February 21, 1980, and in much more detail in their statements to the examiner, take the approach that in reality, their job descriptions reference to "direction and supervision of the professional and administrative activities of an appeal board section and its supporting consultant staff" is something substantially less than that. Specifically, Representative Troiano contends that, instead of being

"supervisors," Chief Members are "group leaders"; and in support thereof he submits a copy of the "Position-Classification Standard for Work Leader/Grade-Evaluation Guide" (U.S. Civil Service Commission - January 1976). Several statements, set out below, offer specifics in support of this position.

...In regard to the specific functions of "Supervisor"... enumerated in the Civil Service Reform Act, I have furnished you with a detailed list showing those we categorically deny performing. We discussed these at length and my fellow Chief Members have furnished you a number of statements including and elaborating thereon.

As to the elements shown by me with a question mark, I will reiterate my explanations. We "direct" our attorneys only as to the decisions to be prepared on appeals in which there have been conducted personal hearings. As to those, we hold executive sessions after the hearings, in which each member casts his vote. In all other cases, decisions are submitted by the attorneys as they see the merits justify. These are signed or modified according to the votes of all the Members of the Section. This however is a judicial and not a supervisory function.

The matters of "discipline" and "adjustment of grievances" are of the most minor type and rare and no more than would be handled by a Group Leader, hereinafter defined... (Chief Member Generoso Troiano)

...I would like to elaborate upon our contention the Chief Members are not supervisors, within the meaning of the applicable statutory provisions, so as to make us subject to the Merit Pay System.

With respect to promotions, there have been instances when my recommendations have simply disappeared somewhere in the front office, and in at least one case my repeated effort to have a probationary employee dismissed was unsuccessful. Whatever our paper authority may be, we do not in fact exercise supervision, as that term is generally understood... (James J. Butler, Chief Member)

...I would like, as a grievant, to offer a few observations concerning the role of the Chief Member. As you see, the Board consists of a relatively small number of attorneys and even less physicians; the supervisory function is practically nil, because attorneys and physicians need virtually no supervision. Each section virtually runs itself. Ours is a "one product economy": sound, well-reasoned and well-written appellate decisions.

Interestingly, the implementing statute ^{refers} to all members as "associate" members. The Chairman is authorized to designate Chief Members of each section of three members. In theory at least, any member could be designated as Chief Member. All members are appointed by the Administrator and approved by the President.

The "supervision" exercised by the Chief Member is a "somebody has to do it" sort of thing. We prepare quarterly qualification evaluations on the attorneys assigned to our section. This is because we review the attorneys' work on a daily basis and someone has to comment on whether the work is good, poor, etc. This is just about our only so-called management function. The Chairman is not bound to ask for or to adopt our recommendations for promotion. The work of staff members is being continuously monitored by the Vice Chairman, so we really have no significant performance-evaluation role. Our overwhelming role is to deliberate on appellate matters before us.

As for discipline, to my knowledge, no Chief Member has had to admonish, reprimand or otherwise discipline a staff member; such actions are just unknown here. Recently, warnings of "unacceptable performance" were prepared in the Front Office and sent to Chief Members for routine signature and issuance, after a consensus opinion that the staff member was not doing the job. The reason why this is done is important. The Chief Member is not asked to prepare the letter so that he or she can be free to attend to the job he is here to do: Reach appellate decisions in the cases before him. We are simply not "supervisors" or "management officials", within the meaning of 5 U.S.C. 7103 a. (10), (11).

I think it should be noted also that the standards for promotion, within-grade increases, and for an attorney-adviser to retain his position are exclusively the standards of the Front Office. They are not the standards of the Chief Members. When Chief Members evaluate the quality of work of their attorneys they do so exclusively in terms of the standards set by the Front Office... (Bruce E. Hyman, Chief Member).

Our supervisory duties are so minimal we feel we do not truly meet the criteria for "supervisor" or "management official." We are assigned attorneys who prepare decisions for the members. We have no say over the assignment of these attorneys, and we have no role in their hiring. Our direction of them is limited to calling to their attention errors in their work. Of course, if they are new, we try to acquaint them with VA law and give them what guidance we can...

Another evidence of lack of control concerns our secretary. She does not call in sick to me; she calls in to one of the front office secretaries. If the secretary proved unsatisfactory, I suppose I could complain to get another, but I do not in any real sense "supervise" her.

As for leave approval, I initially approve leave by following agency administrative guidelines as to how many may be off. I must request an exception from the Vice-Chairman. The associate members merely advise me when they will be off; I do not approve or disapprove their leave per se, except to try to comply with guidelines or request an exception from the Vice-Chairman when necessary...(Elizabeth F. Parris, Chief Member)

I understand our Chairman has made a statement to management that Chief Members do "effectively supervise." As a practical matter, the authority of Chief Members is largely illusory. I have three examples to cite concerning promotions.

First, in August 1976, a GS-13 in my section who was mediocre at best, and who was detailed out at the time, was promoted without a recommendation from me. In fact, I was diametrically opposed to his promotion.

Second, in March 1978 a GS-12 who was, I thought, deserving of promotion, was promoted while I was still in the process of preparing a promotion recommendation.

Third, in May 1978 I recommended an extremely competent GS-13 for promotion to GS-14. Despite several follow ups it took me well over a year to get him promoted. This employee was highly motivated; he had a judicial temperament. However, his production was in the average range, and because of the "numbers mania" here, mediocre employees with higher numbers were promoted before he was.

These three examples are indicative of the role of the Chief Member; i.e., any supervisory authority exercised by Chief Members is minimal and incidental...

(David T. Landers, Chief Member)

Personally, I do not think Chief Members meet the statutory definition of supervisory or management official, even to the extent of "affectively" recommending actions. The Board is so set up that the Chairman is virtually autonomous in making management decisions and may effectively disregard recommendations from his staff (and frequently does so)... (James U. Johnson, Associate Member)

In addition to the management statements already in the record, Acting Vice Chairman Kenneth E. Eaton, BVA furnished the following statement:

Concerning the supervisory duties of the Chief Members of the Board, it is clear that the Chief Members are primarily responsible for reviewing and signing appellate decisions. Their supervisory duties are secondary in nature, however, they do have control over the training and the work of the six or seven attorneys and the secretary in their Section. They are the "boss" when it comes to deciding the procedures to be followed within the Section. The Chief Member cannot tell the Law Member or the Medical Member how to vote, but he/she can tell each of them how the Section will be run on a procedural basis. The recommendation of the Chief Member carries great weight in the management decision to promote or fire an employee in their Section. It is my opinion that the Chief Member should be considered the equivalent of an Administrative Law Judge. I believe that Chief Members effectively recommend such actions as would place them in the position of a supervisor within the meaning of 5 U.S.C. 7103(a) (10).

On February 25, 1980, the Chairma, BVA, forwarded the formal grievance to the to the Deputy Administrator with the following statements:

- a. The Chief Members do have the authority to effectively recommend promotions, rewards and disciplinary actions.
- b. The Chief Members have a direct influence on the quality of decision and output of the section. This is a manager's responsibility.

These specifications are consistent with the Chairman's reconsideration decision, in which he found that Chief Members were both "supervisors" and "management officials."

The grievants' statements acknowledge that they do some of the things that supervisors customarily do: they approve leave, prepare performance evaluations, counsel staff attorneys about cases and, in general, run the section. At the same time, they contend, in effect, that the section tends to run itself; that their supervisory duties are routine administration; and that their authority, such as it is, is not "effective." They cite striking examples: a secretary who does not report to the Chief Member; experiences wherein they have seen their recommendations ignored, or actions taken as if there were no Chief Member authority to recommend.

The Position-Classification Standard for Work Leader/Grade-Evaluation Guide does reflect a similarity in the examiner's view, between the grievant's responsibilities as currently performed, and those of "work leader." The work leader himself participates in the work of the group led, with "leader" duties added. The obvious weakness in the grievant's contention was pointed out above: The Federal Labor Relations Council (FLRC) specifically declined in 1975 to make the labor-management definition of "supervisor" conform to other uses, such as in position classification. Thus, it must be recognized that the work leader guide is not an authoritative source through which to distinguish between "supervisor" and "work leader" or other non-supervisor for the purposes of sec. 7103 a. (10). Nevertheless, the examiner finds, from labor-management law precedents, that a distinction between "supervisor" and "work leader" carries over to that sector.

The examiner reviewed a number of labor-management decisions of the Assistant Secretary of Labor for Labor-Management Relations (A/SLMR) and appellate decisions of the FLRC as well as available guidelines with respect to bargaining units. Although several cases were found which addressed the issue of "supervisor" vs. "work leader," all were clearly distinguishable from the instant case. One of these², however, contained language which makes a clear distinction between these employee categories:

.....(The qualifying words and phrases in the definition) were designed to assure that persons determined to be supervisors would possess actual authority, as distinct from work leaders... (emphasis added)

If the grievants do not in fact possess "actual authority," then they are, as contended, "work leaders."

² Federal Deposit Insurance Corporation - A/SLMR #459; FLRC #75A-39, (8/14/75)

The landmark companion cases which spell out the distinctions between a supervisor and a work leader are China Lake and Mare Island.³ They involve quite similar fact situations, with the issue in each case being the exclusion from the bargaining unit of Fire Captains (called Supervisory Fire-fighters Structural at Mare Island) GS-7 and GS-6. Duties of both were essentially the same. At China Lake, the Fire Captain, who served directly under an Assistant Chief, went with the crew to the fire and directed operations in the absence of, or until the arrival of, the Assistant Chief (who took charge upon arrival). The Captain had authority to shift personnel daily to balance personnel needs; to assign, equitably, overtime and odd jobs. At a fire he had authority to call in specialists (electricians, plumbers, etc.) as the need required. Because the exigencies of the situation usually dictated actions, there was little room for independent judgment. The Captain could suspend employees for up to one hour for an infraction such as drunkenness and recommend more serious action to the Chief or Assistant Chief. Captains also participated in first-level grievances. Training was usually done by crew chiefs. However, Captains prepared performance evaluations for higher review; they certified acceptable level of competence, and they could initiate recommendations for quality step (pay) increases.

The Assistant Secretary determined that Captains were not "supervisors" as defined by sec. 2(c). He found their influence over job assignments minimal and activities clearly supervised by Assistant Chiefs. Procedures were routinized; Captains worked closely with Firefighters. The Assistant Secretary further noted:

...While the evidence indicates that Captains have some functions and responsibilities which distinguish them from other Firefighters, the authority vested in the Captains generally is of a routine or clerical nature not requiring the use of independent judgment. Thus, the Captains clearly have no authority to hire, discharge or lay off employees and the extent of their capacity to discipline employees is limited to one-hour suspensions...

3. U.S. Naval Weapons Center, China Lake, Calif. and Local NO. 129, Int. Assn. of Fire Fighters, AFL-CIO, A/SLMR No. 128, FLRC No. 72-A-11; Mare Island Naval Shipyard, Vallejo, California and Local No. 129, Int. Assn. of Fire Fighters, AFL-CIO, A/SLMR No. 129, FLRC No. 72A-12.

they have no authority to resolve formal grievances and their decisions as a result of preliminary discussions with aggrieved employees are not determinative, but are subject to multiple levels of appeal...

Finally, the Assistant Secretary concluded that their personnel evaluation authority was not "effective," in that they were completed routinely; and their evaluations "have minimal importance in the evaluation of these employees." (The Mare Island determination was similar.)

The agencies involved appealed, contending that the Ass't. Secretary had unduly modified the sec. 2(c) definition, injecting such words as "formal," "permanent" and "sufficient." Further, they contended that sec. 2(c) should be applied in the disjunctive - i.e. that possession of even one of the indicia of supervisory authority sufficed to exclude the employee.

The Council disagreed sharply with the determination of the Assistant Secretary, remanding the case for determination of narrow issues of fact. However, in so doing, the Council laid down several principles. They agreed that section 2 (c) is in fact applicable in the disjunctive; and they agreed that the Assistant Secretary had unduly modified the section. In China Lake the Council held as follows:

...As apparent from use of the conjunction "or", section 2 (c) is written in the disjunctive... As a general rule of statutory construction, words are to be given the meaning commonly attributed to them in the absence of legislative intent to the contrary. In this case, there is no indication of (a contrary intent)...indeed, the purposes of the Order fully support a literal application of section 2 (c)... In view of the above, we find that section 2(c) must be applied in the disjunctive...(and) once the possession of the authority to perform one of the functions set forth in section 2(c) has been established, we hold that that individual is a supervisor....

The decision continued:

2. Does the fact that an alleged supervisor's recommendations are subject to review by higher ranking officials render his recommendations ineffective? Section 2(c) requires that an individual possess the authority actually to perform one of the tasks listed therein, or that an individual possess the authority "effectively to recommend such action."

In our view, the mere fact that a recommendation is reviewed or approved by a higher ranking management official does not, in itself, render a recommendation ineffective. Rather, we hold that the Assistant Secretary must look to the nature and scope of the review in order to determine the effectiveness of the recommending authority within the meaning of section 2(c). Thus, as a general rule, the evidence must establish only that a recommendation is made on behalf of management, that it is based upon the independent judgment of the alleged supervisor, and that the recommendation — either considered separately or in conjunction with the recommendations of other supervisors or management officials — could result in a decision by management to hire, transfer, suspend, or take any of the other actions set forth in section 2(c). To be effective, it is not necessary that one recommendation by one individual be the sole criteria used by higher management in determining whether to take one of the actions listed in section 2(c).

As a practical matter, any other interpretation of the term "effective" would be clearly contrary to the realities of the exercise of authority in the Federal sector. For example, with respect to promotions, in the Federal sector virtually all decisions as to promotions to a higher grade level are made pursuant to established procedures which explicitly require that the recommendation of a lower level supervisor be reviewed or approved by higher officials before being put into effect. Therefore, the key to determining the effectiveness of an alleged supervisor's recommendation is not the mere fact of review, but the impact which that recommendation has upon the overall promotional procedures in force at an activity. In other words, the question is whether that recommendation, even though reviewed at a higher level, results in the promotion or refusal to promote an employee to a higher grade level.

From these principles, then, we adduce that it is enough if the grievants have the authority to perform, or to recommend effectively, any one of the criteria set out in 7103a(10). Further, words must be given their common meaning; and a recommendation, to be effective, need not be adopted, as long as it meets the other conditions set out.

Mr. Troiano, on behalf of the grievants, has listed each of the criteria and then indicated the grievants' opinion of their authority, or absence thereof, with respect to each. Concerning "assign," "promote," "reward," "transfer," "furlough,"

"layoff," "recall," "suspend" and "remove," he notes "no." With respect to the rest, he indicates a question mark.

The examiner concurs in the elimination of all except "promote" and "reward." He finds that the grievants have no effective authority with respect to the assignment, transfer, furlough, layoff, recall, suspension or removal of employees. It has been testified that the "front office" pays little attention to requests even to reassign (much less remove) "deadwood" employees; and while there may be some hyperbole here, the clear frustration expressed by some grievants over their perceptions of impotency in staffing matters was real enough.

With respect to "promote" and "reward", the examiner finds that they must be lumped with "discipline," and "adjust grievances" in the question mark column because of the qualifier "or to effectively recommend such action."

The grievants' authority to discipline is minimal; likewise, to adjust grievances. The examiner is persuaded that the grievants, in practice at least, lack effective authority directly to discipline employees or adjust their grievances; with respect to the latter, the senior attorney appears to handle the everyday sort of dissatisfactions among the staff attorneys, and the members appear to work things out pretty much among themselves.

There remains, in the category of direct authority, the criterion "to direct"; and in the category of authority to recommend, "promote," "reward," "discipline" and "adjust grievances." (Also, to prepare performance evaluations.)

The examiner finds the Chief Member's "direction" of other members to be pro forma; he is, as first among equals, in charge of hearings and the like, but in the examiner's view such authority is not supervisory in nature. Further, the examiner finds that the grievants' "direction" of the section is, effectively, the direction of a function, not of employees per se. Virtually all direction of attorneys, other than case discussions, is accomplished by senior attorneys.

In the course of directing the section's function, however, certain responsibilities devolve upon the Chief Member; and these include the authority to do or to recommend, that which is essential to the operation and effective

functioning of the section. It appears that this is the will of the Chairman, that the Chief Members be relieved of as much administrative responsibility as possible. However, to the examiner, the fact is inescapable that the Chief Members can, and, on occasion do, recommend staff attorneys for promotions or quality step increases ("rewards"). Likewise, in a situation where (for example) a staff member may have been guilty of a serious breach of integrity or some other misdeed, it is inconceivable that the Chairman does not expect, and the Chief Member does not feel a responsibility to report, the facts to the Chairman/Vice Chairman and to recommend some specific corrective action based upon his/her knowledge of the case. Whether he/she so recommends, the examiner finds that in such a situation the Chief Member has the authority, and the responsibility, to do so.

As for adjusting grievances, again it appears clear that should a serious employee dissatisfaction surface in the section, the Chief Member, even if lacking authority (and responsibility) to resolve it at that level, does have the authority to recommend a resolution and, in the interest of all concerned would so recommend.

Finally, there is the preparation of performance evaluations which, standing alone, do not make one a "supervisor." Nevertheless, the record shows that the Chief Members (in consultation with Associate Members) does prepare performance evaluations. These evaluations provide management with information concerning the degree of progress of the attorneys, and are clearly the product of independent judgment. Accordingly, teamed with other criteria, it is a significant supervisory function.

Considering the broad and definitive responsibilities set out in pars. 1 and 2 of the Chief Members' position description,⁴ (P.D.) these findings may appear on

- ⁴. The position description states in pertinent part:
1. Is immediately responsible for the direction and supervision of the professional and administrative activities of an appeals board section and its supporting consultant staff...
 2. Is responsible for continuous supervision over quality and quantity accomplishments in the section. Responsibility is met through self-evaluation and planning, training, and application of quality control standards, work measurement and other Management Techniques.

on their face to be unduly narrow or labored. However, the examiner, as noted above, has, in reviewing the record, taken into account the history of the Chief Member position. The P.D. was drafted in 1966 with a view to elevating the positions GS-15; and for that purpose it was essential to distinguish sharply between chiefs and associates. Shortly thereafter (5/67) the associates filed a successful appeal for reclassification to GS-15. The CSC decision stated in part: "...The Chief Member has no more substantive authority and responsibility than the other Members..." (emphasis added) and found the Chief Members' administrative responsibilities insufficient to warrant a higher grade than that of associates, especially in view of the oversight of attorneys practiced by senior attorneys.

The record does not support a finding that the Chief Member ever functioned in the authoritative manner contemplated by P.D. pars. 1 and 2. If anything, the examiner has found, an assertive Chairman has tended further to dilute the administrative responsibilities of the chiefs in order, it appears, to enable them to devote more time to adjudicative duties.

This said, however, the examiner finds that even the protestations of the grievants have never gone so far as to claim total administrative impotence. In fact, the record supports a finding that the Chairman/Vice Chairman, BVA, do consider and, in a significant number of instances, accept, the recommendations of the Chief Members. In some cases where they have not immediately acted upon the recommendation -- as in the cited instance where a promotion was delayed, and less capable but more productive attorneys were promoted -- the fine hand of the "front office" was nevertheless apparent -- i.e. there appears to have been a conscious decision to "go with" productivity. Under the China Lake criteria, it is obviously enough that the authority to recommend have substance -- be the product of independent judgment (as promotion recommendations almost invariably are) -- not that the recommendation be accepted in all or even most instances.

The examiner is therefore persuaded that Chief Members do have effective authority to make recommendations in the areas indicated. Accordingly, the examiner, for the reasons stated, finds that the grievants are "supervisors" within the meaning of 5 U.S.C. 7103 a(10), and as such are subject to the Merit Pay System established by the Civil Service Reform Act of 1978.

b. "Management Official"

5 U.S.C. 7103 a(11) describes a management official as one whose duties and responsibilities "require or authorize the individual to formulate, determine or influence the policies of the agency."

FPM Bulletin 540-1 states, in its guidelines, that:

...To effectively influence a policy decision, it is necessary for the employee to actively participate in the ultimate determination as to what the policy in fact will be... [Emphasis added]

After a thorough examination of the role of the Chief Member, the examiner is persuaded that the nature of the grievants' position neither requires nor authorizes formulation (i.e. initiating and developing?), determination (i.e. deciding what it will be?), or influencing of agency policy in any "ultimate" sense.

The Chief Member, according to the position description, is in charge of a section of some 10 employees. The Chairman, EVA, has stated for the record his view that Chief Members are management officials in that they "have a direct influence on the quality of decision and output in the section."

The examiner, for reasons set out in part above, finds little practical support for this position. All three members (and, to a significant degree, the senior attorneys) are involved in and contribute (pro or con) to the quality-control and productivity aspects of decision writing; and together they set the tone in the section for these facets of the operation. The degree of control exercised by the Chief Member would appear to depend almost entirely upon the force of the individual Chief Member's personality. One of the grievants' strongest equitable objections to Merit Pay System coverage is directed at their sense of lack of control over quality of personnel and consequent quality and quantity of production. The only apparent basis for saying that Chief Members formulate, determine or influence agency policy lies in their decision-making functions. However, that responsibility/authority is shared equally with associate members. Furthermore, any ultimate influence is fortuitous. Mr. Troiano makes this point effectively:..."it is important to note that our appellate decisions are not precedents to be followed by other Board Sections or agencies of original jurisdiction..."

Quality and high productivity are altruistic agency objectives; striving toward such goals or even persuading or influencing others to do so is not "influencing" agency policy; the policy exists, it is built in.

The examiner does find in the grievant's position description two duties (other than 1 and 2) which agreeably suggest a "management" role for Chief Members: Paragraphs 7 and 8. They read as follows:

7. Advises the Vice Chairman on significant policy and procedural aspects of individual case decisions rendered and of their impact on the appellate and benefit programs.
8. Confers with representatives of the General Counsel's Office, the Department of Veterans Benefits, Medicine and Surgery and Insurance and with service organizations to discuss either individual appeals cases or those issues which have a veteran-population-wide impact.

In other words, the Chief Member has consultative responsibilities with his immediate superior, the Vice Chairman, and with representatives of other policy-level officials, and with veterans' organizations concerning matters which are perceived as likely to affect policy. In so doing, the Chief Member's role is, the examiner finds, "limited to rendering resource information or recommendations rather than active participation in final determinations of policy."⁵ As such he is not a "management official."

The examiner has studied the guidelines furnished in FPM Bulletins 540-1, 540-2; VA Interim Issue 00-79-31; and OLMR Management Practices Manual. Nothing he found therein persuades the examiner that the grievants are "management officials," within the meaning of 5 U.S.C. 7103 a.(11).

c. Equitable Consideration

The grievants have stressed their unanimity in opposition to inclusion in the Merit Pay System and have called attention to impressive support from their Associate Members. Interestingly, pay per se seems to be a minor concern (though some grievants expressed concern at having their pay partly determined by the performance of employees over whom they had minimal control and no "say" about assignments). Several of the senior grievants, at the top of their grade and with no salary axe to grind, nevertheless came forward to make strong statements

⁵U.S. Army Reserve, 166 Support Groups, Fort Buchanan, P.R. -A/SLMR #1171, 12/28/78

expressing their concern over the integrity of the adjudicative system.

Some comments follow:

I am one of the Senior Chief Members and am eligible to retire. However, I would like to express my concern over the determination that Chief Members are subject to the Merit Pay System. It seems to be a step to gain tighter management control over employees who, by the nature of their jobs, must be free to exercise a degree of independence and certainly to adjudicate without feeling that they are under someone's thumb. I fear that this determination would be a first step to the politicizing of an organization which over the years has had a lot of pride and sense of independence ... (Woodrow B. Morris, Chief Member)

I am one of several Chief Members who are eligible to retire and who thus can be viewed as having a lesser personal stake in this grievance. Nevertheless, I want to express my deep concern over Chief Members being subject to the Merit Pay System. We have been gratified that the BVA has over the years been free of outside interference, and members have had an opportunity to apply independent judgment to the adjudicative process. We are frankly alarmed at the implications which seem to be inherent in "pursestring control" of Chief Members. The very fact that we older Chief Members are so greatly disturbed about this change is indicative of our regard and respect for the organization as presently constituted; and we believe that any step which could open the door to politicization of our appellate system is certain to affect adversely the effectiveness of our program and the morale of our staff... (Lewis P. Summers, III, Chief Member)

Another disturbing factor to me is the public effect, once appellant representatives learn we are operating under a "reward and punishment" system. The first such representative who loses will scream to high heaven that our decisions are subject to influence and so are not fair and impartial... (James J. Butler, Chief Member)

I know of no other GS-15 employee whose appointments are subject to Presidential approval. It seems clear we were meant to exercise independent, unfettered judgment in the decision making process. It seems equally clear that placing Chief Members under the Merit Pay System will jeopardize that independence... (David T. Landers, Chief Member)

There appear to be, in addition to morale problems, two basic conflicts with decisional independence. One, placing Chief Member under Merit Pay gives the Chairman and Vice-Chairman additional "clout", though the purse strings, in getting their viewpoints adopted. Two, a Chief Member

whose pay rate may depend upon productivity may tend to neglect thoroughness and quality in favor of getting cases out. This could easily result in a potential "allowance" being overlooked. (James U. Johnson, Legal Member)

My feelings concerning the inclusion of Chief Members in the Merit Pay System are very much as expressed in our petition. The basic questions concern considerations of the type of work we do and judicial independence. We feel that our work is not too different from that of Administrative law judges, who are excluded...

The staff concern over [inclusion in the Merit Pay System] has been so great that we have already lost several extremely promising attorneys and law members, who are taking Administrative law judge positions. The moment we come under the Merit Pay System the threat to our judicial independence comes into being: it creates a "rewards and punishments" situation not now existing. I do not think that such a system comports with accepted concepts of judicial independence.

(Elizabeth F. Farris, Chief Member)

In summary, the grievants, keenly aware of their "Presidential appointee" status, and seeming to possess a high esprit de corps, believe that they have been unfairly singled out to be placed in a salary category which they regard as demeaning. More importantly, they have grave concerns about participating in a pay system which seems to provide unprecedented opportunities for political mischief, to the detriment of the integrity of their adjudicative system.

One reason the grievants do not feel that they deserve such special (and unwelcome) categorization is found in the language of Title 38, U.S. Code, Chapter 71, secs. 4001, 4002, wherein all members are defined as "associate members," with the Chairman authorized to create sections and "designate" a chief for each. The inference is clear that "chief member" is a title which could be rotated among associate members, or the duties handled in any other way the Chairman sees fit.

The grievants have analogized their positions to those of Administrative Law Judges, and have made other interpretations of the Civil Service Reform Act which they suggest indicate an intent not to include their positions under the Merit Pay System. The examiner considers the language of 5 U.S.C. 5401 (b) (1), read in conjunction with 5 U.S.C. 7103 a(10)(11), to be clear on its face in stating that, except for specific exclusions not presently applicable to the grievants, any "supervisor" or "management official" at GS-13, GS-14 or GS-15 is covered by the Merit Pay System. Nonetheless, the examiner has been deeply impressed with the sense of demoralization conveyed by the grievants and believes their concerns to be predominantly altruistic.

RECOMMENDATIONS

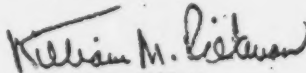
I. The examiner recommends that the current determination that grievants are "supervisors", subject to the Merit Pay System, be sustained.

II. The examiner recommends that so much of that determination as found the grievants to be "management officials" not be sustained.

III. Because it seems less than certain that Congress specifically intended⁶ that adjudicative functions such as EVA be subject to the Merit Pay System, and in view of what he regards as valid equitable arguments against it, the examiner recommends that the deciding official take appropriate steps to provide an exclusion for grievants, on one of the following bases:

- a.) Preferably by consultation with Chairman,⁷ EVA concerning the feasibility of converting "chief member" to a title carrying only the responsibilities related directly to the adjudicative process, and making all EVA members exempt from the Merit Pay System.
- b.) Alternatively (or even concurrently) recommending to the Administrator that application be made pursuant to 5 U.S.C. 5401 (b)(2)(c) for a Presidential exclusion under 5 U.S.C. 5401 (b)(2)(A)(iii).

Respectfully submitted,


WILLIAM M. RICKMAN
GRIEVANCE EXAMINER

⁶ 5 U.S.C. 5401(b)(2)p provisions for Presidential exclusion.

⁷ Chairman has stated, in a letter to Merit Systems Protection Board dated May 8, 1980: "...Since each of the three members of the sections of the Board of Veterans Appeals has an equal vote when it comes to deciding an appeal, the primary responsibility, it would appear reasonable for all to be paid on an equal basis. I would interpose no objection if it were determined that the Chief Members are exempt from the provisions of Merit Pay..."

MAR 2 1981

Dear

This letter is to notify you that your position has been reviewed to determine whether it should be included in the Merit Pay System under the Civil Service Reform Act. Your position will be included because it meets the definitions for supervisor/manager under the Supervisory Grade Evaluation Guide/Labor Management Relations Definitions.

If you do not agree with the determination you have a right to request reconsideration. This request for reconsideration must be made within five (5) calendar days after receipt of this notification. Your request must be in writing and should be sent through normal channels to the Chairman, Board of Veterans Appeals who is the reconsideration official. He will issue a decision within ten (10) calendar days after receipt of your request for reconsideration.

KENNETH E. EATON
Vice Chairman

Let sent to:

Carrington
Cohn
Andrews
Russell

SLCOHN:lsm 2/26/81

MAR 2 1981

Dear

This letter is to notify you that your position has been reviewed to determine whether it should be included in the Merit Pay System under the Civil Service Reform Act. Your position will be excluded because it does not meet the definitions for supervisor/manager under the Supervisory Grade Evaluation Guide/Labor Management Relations Definitions.

If you do not agree with the determination you have a right to request reconsideration. This request for reconsideration must be made within five (5) calendar days after receipt of this notification. Your request must be in writing and should be sent through normal channels to the Chairman, Board of Veterans Appeals who is the reconsideration official. He will issue a decision within ten (10) calendar days after receipt of your request for reconsideration.

KENNETH E. EATON
Vice Chairman

GS-13

Ltr sent to:

Gunning, B
Jones, S.A.
Dannaher, T
Sullivan, R.E.
Martin, J.
Deitch, R.
Jones, R.T.
Leaf, R.
Moulaison, P.

GS-14

Letters sent to:

Sharp, J.
Storey, P.
Johnson, J. M.
Day, J.
Gallagher, F.
Anthony

SLCOHN:lsm

2/26/81

BOARD OF VETERANS APPEALS

Attorneys, Grade GS-13

Listed in Order of Date of Grade

NAMES	DATE OF GRADE	SERVICE COMPUTATION		DATE JOINED	BVA
		DATE			
STEVENS, C. M.	8-01-65	5-28-41		9-15-57	
TRIBITT	8-04-74	1-16-61		6-22-70	
ELLIS	5-25-75	6-07-70		9-03-72	
HARRIGAN	8-17-75	11-08-69		3-12-72	
GULLIHAN, L. M.	8-31-75	5-24-71		4-09-73	
HAYDEN	12-21-75	7-17-69		10-18-72	
PIERCE	7-04-76	4-21-47		2-06-75	
GUTSTEIN	9-12-76	1-19-64		3-02-75	
POTTER	10-24-76	7-28-68		12-23-73	
SHAW	11-21-76	1-08-73		5-07-73	
GALLAGHER	12-19-76	6-10-64		10-14-73	
SHARP	2-13-77	4-29-70		11-19-73	
WILKINS	2-13-77	4-09-73		10-14-73	
TUTERA	9-25-77	10-21-71		8-25-75	
BEVERIDGE	9-25-77	9-15-69		8-11-75	
SHEA, M. W.	10-09-77	8-30-71		9-14-75	
JOHNSON, J. M.	3-26-78	2-27-73		2-29-76	
ANTHONY	3-26-78	6-19-69		3-03-76	
STEIN	3-26-78	12-30-72		2-29-76	
FRANK	7-30-78	7-29-72		7-06-76	
COFFELT	7-30-78	6-13-62		9-03-72	
STOREY	9-10-78	1-17-74		8-15-76	
DAY, J.	10-22-78	4-11-74		9-26-76	
ANDERSON	11-05-78	3-28-74		7-06-76	
BOSCH	11-19-78	8-17-70		11-06-77	

CONT'D - Board of Veterans Appeals -- Attorneys, Grade GS-13 -- Listed in Order of Date of Grade

NAMES	DATE OF GRADE	SERVICE		DATE JOINED BVA
		COMPUTATION DATE		
ANDREWS	12-17-78	9-29-71		11-09-75
WITT	12-31-78	12-10-70		12-13-76
MATHIS	2-11-79	8-23-73		11-10-76
SENYK	5-06-79	4-26-74		1-23-77
GEHRING	7-15-79	3-23-74		5-23-76
SCHOENBERGER	7-29-79	9-26-69		11-20-77
SEERY	9-09-79	11-18-72		8-02-76
GERMAIN	12-16-79	2-10-74		3-05-79
REGAN	12-16-79	5-27-72		3-27-77
TOBIN	1-13-80	5-07-74		11-15-76
SLOCUMB	1-13-80	9-09-72		12-13-76
REITER	2-10-80	6-30-67		6-30-67
ROBERTS	3-23-80	9-10-66		8-31-75
ROBIN	4-06-80	1-02-77		1-02-77
OLSON	4-06-80	4-18-74		2-22-77
O'BRIEN	6-15-80	12-28-73		11-29-76
GUNNING	7-15-80	3-13-77		3-17-77
JONES, S. A.	10-05-80	8-03-76		8-28-77
DANNAHER	11-02-80	9-11-77		9-11-77
SULLIVAN, R. E.	11-02-80	5-16-78		10-27-78
MARTIN	11-16-80	10-12-75		10-11-77
DEITCH	12-04-80	11-14-74		11-06-77
JONES, R. T.	11-16-80	5-28-74		9-25-77
LEAF	11-16-80	8-19-73		10-03-77
MOULATSON	1-25-81	3-03-75		12-18-77

GS-14 ATTORNEY-ADVISERS

Listed by Date of Grade

NAME	DATE OF GRADE	EOD BVA
CONWAY, Thomas	6-24-73	5-29-67
SHEA, Leonard	7-22-73	11-17-46
BRAUN, Theodore	11-25-73	9-17-62
WORTMAN, John	11-25-73	11-14-65
SHEINBERG, Monroe	3-03-74	7-10-70
KANNEE, Bruce	11-09-75	1-09-67
McLAUGHLIN, Thomas	3-14-76	12-28-70
McCAFFERTY, Edward	11-21-76	5-17-70
CAFFERY, Richardson	10-23-77	7-23-72
GOTTFRIED, Lawrence	10-23-77	3-08-71
PETTIT, Calvin	10-23-77	6-25-72
WHITE, John	11-20-77	3-27-73
BOOHER, Alice	4-09-78	2-17-69
MOEHLMANN, Holly	4-09-78	12-03-73
WRIGHT, Philip	4-09-78	8-19-73
KOZINA, John	6-04-78	7-10-67
JOHNSON, John P.	12-03-78	1-07-73
MARINELLI, Bonnie	3-25-79	11-30-70
FAVA, Anthony	7-29-79	11-29-72
HELSPER, William	7-29-79	8-01-73
SYMANSKI, Charles	7-29-79	9-11-72
TALBOT, Francis	7-29-79	10-11-73
ERKESBRACK, Richard	8-12-79	8-05-73
PACE, Timothy	8-12-79	9-03-72
HARRIGAN, Terrance	2-10-80	3-12-72
SULLIVAN, Lawrence	2-10-80	4-09-73
LEVERIDGE, Claybourne	3-09-80	8-11-75
SHEA, Michael	3-09-80	9-15-75
TUTERA, Albert	3-09-80	8-25-75
WILKINS, Stephen	3-09-80	10-14-73
STEIN, Daniel	6-15-80	2-29-76
JOHNSON, J. Michael	9-21-80	2-29-76
STOREY, Peter	9-21-80	8-15-76
ANTHONY, James	10-19-80	3-03-76
GALLAGHER, Bernard	10-19-80	10-14-73
DAY, Jonathan	11-02-80	9-26-76
SHARP, Jane	2-22-81	11-19-73

and letters



Veterans
Administration

Date: FEB 3 1981

Memorandum

To: Department and Staff Office Heads

Subject: Informing Employees of their
Inclusion in/Exclusion from
Merit Pay

1. Interim Issue 00-79-31 dated November 5, 1979, requires that all employees in grades GS-13, 14 and 15 be notified in writing of the decisions to include or exclude their positions from the merit pay system. The interim issue also specifies that the notification must contain the reason for the determination and inform the employee of his/her right to request reconsideration of the determination.
2. All employees who occupy GS-13, 14 or 15 positions should already have received their written notification about inclusion in/exclusion from merit pay. If you have any employees who have not yet been notified in writing, you should ensure that they receive the written notification as soon as possible. I have attached two sample letters, one for merit pay inclusion, the other for exclusion from merit pay, which you can use or adapt for use in your organization. Paragraph 2 of the sample inclusion letter should specify which one of the three possible criteria the position meets for inclusion. Questions regarding these criteria should be directed to your servicing classification specialist in the Classification Division (055A).
3. In addition to informing those employees who were occupying GS-13, 14, or 15 positions when the initial merit pay determinations were made, you should also provide the appropriate written notification to employees who have been promoted or reassigned to positions at GS-13, 14 or 15 since the initial determinations were made. The agency is in the process of developing policies and procedures relating to these subsequent determinations which may eliminate the need for a notification letter. However, until such time as those

-2-

policies and procedures are promulgated, you must continue to inform in writing, all employees moving into GS-13, 14 or 15 positions of their inclusion in or exclusion from merit pay.

R. L. Norman
RICHARD L. NORMAN
Director, Central Office
Personnel Service (055A)

Attachments (2) *

Distribution: COB
SS (055A) FSB 715, 720, 784 only

ATTACHMENT A

SAMPLE MERIT PAY EXCLUSION LETTER

SUBJ: Identification of Merit Pay Positions

1. According to the Civil Service Reform Act of 1978, those GS-13, 14, and 15 Federal employees whose position duties meet: (1) the U.S. Office of Personnel Management's (OPM) definition of supervisor (see OPM's Supervisory Grade-Evaluation Guide-SGEG); (2) the 5 U.S.C. 7103 (10) definition of supervisor; or (3) the 5 U.S.C. 7103 (11) definition of management official are subject to an agency's merit pay system.

2. The duties of your position do not meet any of the above-mentioned definitions for supervisor and management official. Therefore, you will not be subject to the VA's merit pay system unless and until such time as your position duties and responsibilities change so they meet one of the definitions mentioned above.

3. If you do not agree with this determination, you may request reconsideration. The request for reconsideration must be in writing and forwarded through normal channels to _____

_____ Title of the deciding
official within five (5) calendar days after your receipt of

this notification. It should outline the specific reasons why you disagree with the determination. The _____

_____ Title of the deciding official
will issue a reconsideration decision (which may sustain or change the initial determination) within ten (10) calendar days following receipt of your request for reconsideration.

SIGNATURE

ATTACHMENT B

SAMPLE MERIT PAY INCLUSION LETTER

SUBJ: Identification of Merit Pay Positions

1. According to the Civil Service Reform Act of 1978, those GS-13, 14 and 15 Federal employees whose position duties meet: (1) the U.S. Office of Personnel Management's (OPM) definition of supervisor (see OPM's Supervisory Grade-Evaluation Guide-SGEG); (2) the 5 U.S.C. 7103 (10) definition of supervisor; or (3) the 5 U.S.C. 7103 (11) definition of management official are subject to an agency's merit pay system.

2. The duties of your position have been determined to meet the

- SGEG and 5 U.S.C. 7103(10) definitions of supervisor
- 5 U.S.C. 7103(10) definition of a supervisor.
- 5 U.S.C. 7103(11) definition of a management official

Accordingly, you will be subject to the VA's merit pay system unless and until such time as your position duties and responsibilities change so they no longer meet the definition(s) mentioned above.

3. If you do not agree with this determination, you may request reconsideration. The request for reconsideration must be in writing and forwarded through normal channels to

Title of the deciding official
within five (5) calendar days after your receipt of this notification. It should outline the specific reasons why you disagree with the determination. The _____ will issue a

Title of the deciding official
reconsideration decision (which may sustain or change the initial determination) within ten (10) calendar days following receipt of your request for reconsideration.

SIGNATURE

SMOOTH RUFFCHIEF Members
Committee

Mr. Edward P. Scott
General Counsel
Senate Veterans' Affairs Committee
Russell Senate Office Bldg., Suite 414
Washington, DC 20510

*identical letter
to Mark Fleming*

Dear Mr. Scott:

The purpose of this letter is to request another appointment with you in order to explain our concern with the continued efforts to change the longstanding basic structure of the Board of Veterans Appeals in ways which we believe will compromise the decisional independence of the Board Members and Board Sections. Some weeks ago you kindly met with several Board Members and thereby encouraged all of us in our efforts to have Chief Members exempted from inclusion in the Performance Appraisal and Merit Pay Systems. Since that meeting, several disconcerting events have transpired:

a. The Examiner appointed to conduct an inquiry into the Chief Members' formal grievance concluded that Chief Members are subject to inclusion in the Merit Pay System because, at least in a technical sense, they are "supervisors" as defined by the Civil Service Reform Act of 1978.

b. However, the Examiner recommended to the Deputy Administrator that because of the Board's adjudicative functions and because of "valid equitable arguments" certain "appropriate steps" should be undertaken (alternatively or concurrently) to provide an exclusion for Chief Members.

STEP ONE: Investigate the "feasibility of converting 'chief member' to a title carrying only the responsibilities related directly to the adjudicative process."

STEP TWO: Have the Administrator (as the agency head) make application to the Office of Personnel Management for an exclusion pursuant to 5 USC 5401(b)(2).

c. On August 8, 1980, the Deputy Administrator advised the Chief Members in writing that he was adopting the Examiner's recommendations. He stated that the Chairman, Board of Veterans Appeals, "will explore the feasibility of removing supervisory duties from (Chief Members) and assigning them elsewhere." He further stated if the Chairman determines that such reassignment of duties is not feasible, then he (the Deputy Administrator) will "recommend to the Administrator that application be made pursuant to 5 USC 5401(b)(2)(C) for exclusion from merit pay coverage."

d. Since the receipt of the Deputy Administrator's decision, we have been advised orally by the Chairman and Vice Chairman that there is no current plan to seek an exclusion for Chief Members from the Office of Personnel Management, and that effective October 1, 1980, the Chief Members will become a part of the Merit Pay System and remain in that status while the reorganization plan is being worked out and processed for approval and implementation.

e. The Chairman's reorganization plan (which was drawn up and forwarded to the Deputy Administrator without any opportunity for submission of recommendations or suggestions by Associate Members) calls for the establishment of four separate Appellate Services. Each Service is to be headed by a Deputy Vice Chairman who will be in the Senior Executive Service. Each Deputy is to have supervisory control and authority over four Board Sections. We are very concerned because the Deputies' supervisory authority is to extend not only to the attorney staff, but also to Board Members. In response to our specific request, a copy of the proposed Position Description pertaining to the Deputy Vice Chairmen was made available to us for examination in the Chairman's Office.

f. Based on several discussions and on our review of the proposed Position Description, it is very clear that the Deputies' authority with respect to both the attorney staff and Board Members is to be wide-ranging as is in keeping with membership in the Senior Executive Service. However, we have been told that this reorganization will be very good for the Board because it will provide additional upward mobility for some Board Members and also result in decisions of a higher degree of quality and uniformity.

Upper mobility is not a primary concern for most of the Board Members. Our chief concern is independent decision making. During the course of that grievance procedure, both the Chairman and the Vice Chairman conceded that our duties and responsibilities as Board Members are closely analogous to those of an Administrative Law Judge. Of course, the very cornerstone of the A.L.J. Program is independence - both in appearance and in fact. Therefore, it is not at all clear to us why, after all these years, Board Members suddenly need such close supervision. We are very proud of the fact that Title 38 requires appointments to the Board must be approved by the President. We believe that this statutory provision constitutes the clearest possible evidence that Congress intended our decisional independence to remain completely unfettered except, of course, for the provisions of 38 USC 4004(c).

The proposed reorganization plan leaves unresolved one of the basic concerns discussed in the Chief Members' grievance. In the grievance petition it was emphasized that under the Merit Pay System too much authority would accrue to the Chairman and Vice Chairman and that such accrual could not help but compromise our decisional independence because of the power of financial reward (or the withholding thereof) carries with it an inherent capacity to exercise a very strong influence. With equal validity, it can also be said that the power to use four surrogates to look over someone's shoulder all day carries with it an inherent capacity to exercise a very strong influence! We believe that such a pervasive form of supervision (and essentially undefined supervision at that) is undesirable, inappropriate, and therefore not necessary. In point of fact, because they will retain their membership on the Board, three of the Deputy Vice Chairmen could, with the cooperation of the Chairman or Vice Chairman, overrule any proposed decision made at the section level. Clearly our decisional independence would be compromised - certainly in appearance and very likely in fact.

In addition to the factors discussed above, there are several legal reasons why we are in opposition to the proposed reorganization. Title 38, Section 4001, provides that the Board shall consist of a Chairman, Vice Chairman, and not more than 50 Associate Members. Section 4002 provides that the Chairman may divide the Board into Sections of three members and designate one of the Section Members to serve as Chief. We believe that proposed reorganization is contrary to the clear provisions of the law in the following respects:

- a. There is no provision in the law for Deputy Vice Chairman. Even more legally significant, the extensive supervisory authority invested in the four Deputies would certainly make them more than our "associates" and thus be contrary to the letter, intent, and spirit of Title 38.
- b. The proposed reorganization cannot help but result in the phasing out of Chief Members. This is of questionable legality because the Chief Member position is specifically provided for in Title 38.
- c. It is our understanding that the Deputies' authority may even extend to reassigning Board Members from one section to another. Section 4002 clearly names the Chairman as the person who is to exercise such authority.

d. During the 1981 fiscal year we will drop from 16 Sections down to 15 Sections, apparently because of budgetary constraints. However, for the 1982 fiscal year it is planned that we will return to 16 Sections. This raises an interesting legal and mathematical question. How can we have 16 three-member sections and four Deputies and still remain within the mandated limit of 50 associate members? We do not believe that Congress intended for some of our Sections to operate with less than three members on a permanent basis.

In conclusion, we wish to emphasize that there are two basic common sense reasons why the proposed reorganization is undesirable:

a. The main problem at the Board of Veterans Appeals is a tremendous case load - not unreliable Board Members who require close daily supervision. It just does not make good sense to assign four Board Members to perform essentially unnecessary supervisory duties when there is a real and compelling need for them to be "on the line" reviewing and disposing of appeals.

b. If the proposed reorganization is implemented, it will result in a total of six members of the Board being in the Senior Executive Service: The Chairman, Vice Chairman, and four Deputy Vice Chairmen. We believe this highly inappropriate because many of the arguments we have made against the Merit Pay System apply with equal or even greater force to the Senior Executive Service. We are all quasi-judicial officials - not supervisors, not senior executives!

We regret that this letter is so long, but we felt it was important for us to demonstrate that there are good, solid reasons for our concern and apprehension about the proposed reorganization, particularly since it is being put forward as a solution to the Chief Members' grievance. As proposed, the reorganization goes well beyond what the Grievance Examiner recommended and at the very same time falls far short of resolving some of the basic concerns addressed in the Chief Members' grievance petition.

One of us will be in touch with your secretary in the next few days. We hope you can find the time to meet again with two or three of us. We would like to discuss possible solutions to our predicament, including legislative action such as an amendment to Title 38 to make our positions analogous to Administrative Law Judges and thus beyond the reach of either the Merit Pay System or the Senior Executive Service. Two current examples of succinct statutory language which would accomplish this goal are set forth in 5 USC 5372 and 41 USC 607(b)(1).

We sign as representatives of the overwhelming majority of all Board Members, including Chief Members, Legal Members, and Medical Members.

Sincerely,

D. T. LANDERS
Chief Member
389- 2255

J. J. BUTLER
Chief Member
389-3117

D. J. B. RIEMAN
Chief Member
389-2067

J. U. JOHNSON
Legal Member
389-2238

RAE T. WOOD
Chief Member
389-2160

Copies to:
CO1
05
01

9/17/80

TO: Chief Members

I telephoned several very helpful HHS (formerly HEW) and OPM officials who gave me the following information:

- a. The request from the Social Security ^{Agency} Council for an exemption from the Merit Pay System never reached the Office of Personnel Management. This is because the secretary of the then HEW refused to endorse the request! (The exemption request must come from the agency head.) You may recall that we were hoping to use the Social Security Council as a test case for our own situation.
- b. Office of Personnel Management has received a total of six (6) requests for exemptions and forwarded them all to the White House. Five (5) requests are based on the argument that the agency involved is too small for effective implementation of the Merit Pay provisions. (No, we can not make that argument ourselves because we are part of the VA.)
- c. An official of the Office of Personnel Management further advised me: (1) that the exemption provisions of the law are considered to be "rather narrow"; (2) that an exemption based on quasi judicial functions would be "breaking new ground"; and (3) that it is surprising how many people in government perform such functions. This particular official knew a great deal about the BVA; she became very vague when I asked her how she obtained this information. My guess is that Central Office personnel types had already called her and asked her essentially the same questions.

J. U. J.

P.S. Attached for your review are pertinent excerpts from Title 5, U. S. Code.

"CHAPTER 54—MERIT PAY AND CASH AWARDS

"Sec.

"5401. Purpose.

"5402. Merit pay system.

"5403. Cash award program.

"5404. Report.

"5405. Regulations.

"§ 5401. Purpose

"(a) It is the purpose of this chapter to provide for—

"(1) a merit pay system which shall—

"(A) within available funds, recognize and reward quality performance by varying merit pay adjustments;

"(B) use performance appraisals as the basis for determining merit pay adjustments;

"(C) within available funds, provide for training to improve objectivity and fairness in the evaluation of performance; and

"(D) regulate the costs of merit pay by establishing appropriate control techniques; and

"(2) a cash award program which shall provide cash awards for superior accomplishment and special service.

"(b) (1) Except as provided in paragraph (2) of this subsection, this chapter shall apply to any supervisor or management official (as defined in paragraphs (10) and (11) of section 7103 of this title, respectively) who is in a position which is in GS-13, 14, or 15 of the General Schedule described in section 5104 of this title.

"(2) (A) Upon application under subparagraph (C) of this paragraph, the President may, in writing, exclude an agency or any unit of an agency from the application of this chapter if the President considers such exclusion to be required as a result of conditions arising from—

(i) the recent establishment of the agency or unit, or the implementation of a new program,

(ii) an emergency situation, or

(iii) any other situation or circumstance.

"(B) Any exclusion under this paragraph shall not take effect earlier than 30 calendar days after the President transmits to each House of the Congress a report describing the agency or unit to be excluded and the reasons therefor.

"(C) An application for exclusion under this paragraph of an agency or any unit of an agency shall be filed by the head of the agency with the Office of Personnel Management, and shall set forth reasons why the agency or unit should be excluded from this chapter. The Office shall review the application and reasons, undertake such other review as it considers appropriate to determine whether the agency or unit should be excluded from the coverage of this chapter, and upon completion of its review, recommend to the President whether the agency or unit should be so excluded.

"(D) Any agency or unit which is excluded pursuant to this paragraph shall, insofar as practicable, make a sustained effort to eliminate the conditions on which the exclusion is based.

"(E) The Office shall periodically review any exclusion from coverage and may at any time recommend to the President that an exclusion under this paragraph be revoked. The President may at any time revoke, in writing, any exclusion under this paragraph.

5 USC 7103.

Exclusions.

Presidential
reports
transmitted to
Congress.

Filing of
applications.

Review.

The underlined language has been in the books for many years. All the Civil Service Reform Act did was change the number from 5362 to 5372 and change CSC to OPM. ALJ's and statutory analysis positions are beyond the reach of either the SES or the merit pay system. In addition, such positions are not entitled quality steps increases.

If, however, the statute does not say that ratings in and of themselves are illegal.

Ch. 53 PAY RATES AND SYSTEMS 5 § 5372

Cross References

Annual Reports by agency heads covering positions for scientific and professional personnel, see section 3104 of this title.

Library References

United States Code.

U.S. Public Laws 95-454, 95-455.

§ 5372. Administrative law judges

Administrative law judges appointed under section 3105 of this title are entitled to pay prescribed by the Office of Personnel Management independently of agency recommendations or ratings and in accordance with subchapter III of this chapter and chapter 51 of this title.

Pub. L. 89-654, Sept. 6, 1966, 80 Stat. 473, § 5362, amended Pub. L. 95-251, § 2(a)(1), (b)(1), Mar. 27, 1978, 92 Stat. 183, and renumbered and amended Pub. L. 95-454, Title VIII, § 801(a)(3)(A)(ii), Title IX, § 906(a)(2), Oct. 13, 1978, 92 Stat. 1221, 1224.

Historical and Revision Notes

Derivation: United States Code 5 U.S.C. 5310 (3d sentence)	Revised Statutes and Statutes at Large June 11, 1948, ch. 324, § 11 (3d sentence), 60 Stat. 244.
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Explanatory Notes

The exception from the operation of the efficiency rating system is omitted as covered by sections 4301(2)(E) and 4301(a)(10). The reference to "subchapter III of this chapter and chapter 51 of this title" is substituted for "the Classification Act of 1923, as amended" on authority of section 1106(a) of the Act of Oct. 26, 1949, ch. 762, § 3 (not 972).

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

1978 Amendments. Pub. L. 95-454, § 2(a)(1), substituted "Office of Personnel Management" for "Civil Service Commission".

Pub. L. 95-251 substituted "Administrative law judges" for "hearing examiners" in the section caption and the text.

Effective Date of 1978 Amendment. Amendment by section 906(a)(2) of Pub. L. 95-454 effective 90 days after Oct. 13, 1978, see section 907 of Pub. L. 95-454, set out as a note under section 1101 of this title.

Legislative History. For legislative history and purpose of Pub. L. 95-251, see 1978 U.S. Code Cong. and Admin. News, p. 496; see, also, Pub. L. 95-454, 1978 U.S. Code Cong. and Admin. News, p. 2723.

Cross References

Additional requirements imposed by statute or otherwise wrought by law not limited or repealed by this section, see section 550 of this title.

Office of Personnel Management, investigations, reports, and regulations for purposes of this section, see section 1305 of this title.

Subsequent statute to be held to supersede or modify this section only to extent that they do so expressly, see section 550 of this title.

Library References

Administrative Law and Procedure § 135.	C.J.S. Public Administrative Bodies and Procedure § 14.
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MERIT SYSTEMS PROTECTION BOARD

Washington, D.C.

NOTICE TO:

Mr. Sidney J. Shuman
Chairman, Board of Veterans Appeals
Veterans Administration
810 Vermont Avenue, N.W.
Washington, D.C. 20420

IN THE MATTER OF:

Gene Troiano, et al.

DOCKET NUMBER: DC075209112

The Board has received a petition for review of the initial decision of the presiding official in the above-captioned case. Section 1201.115 of Title 5, Code of Federal Regulations, provides that other parties will be granted an opportunity for response to the petition. As the petition does not indicate that a copy was sent to you, the Board is forwarding the attached copy of the petition to you for your information and is providing you with the opportunity to submit any written response to the petition that you may care to make. Additional opportunities for response will not be granted.

If you decide to respond, three copies of your response must be filed with the Office of the Secretary, Merit Systems Protection Board, within twenty (20) calendar days from the date of this Notice. A copy of your response will be sent to the petitioner and to any other parties to the appeal.

By copy hereof, the petitioner is advised that the Board's regulations contemplate that the petition for review will be complete when filed. There is no regulatory provision for the acceptance of further materials submitted by the parties.

This petition has been assigned the above-noted docket number. The parties are hereby advised that all submissions and correspondence regarding this matter must make reference to the docket number.

Cameron C. Smith
Cameron C. Smith, Director
Office of Appeals

Attachment

MAY 2 1980

(Date)

Copy to Petitioner
Mr. Gene Troiano
Board of Veterans Appeals
Veterans Administration
810 Vermont Avenue, N.W.
Washington, D.C. 20420

Copy to: Dr. Alan K. Campbell
Director, Office of Personnel Management
Attn: Jeanette L. Neville
Room 3508
1900 E Street, NW
Washington, D. C. 20415

Copy to: Office of the Secretary

Copy to: OA File

Pers. 6

MAY 3 1980

Office of the Secretary
Merit Systems Protection Board
Washington, DC 20419

RE: Gene Troiano, et. al.
Docket # DC075209112

Thank you for the copy of the petition submitted in the above-docketed case and for the opportunity to respond.

While I have nothing to add with respect to the issue of jurisdiction, I would like to point out that there is very little difference between the duties and responsibilities of Members of the Board of Veterans Appeals and Administrative Law Judges who do not come under the merit pay provisions of the Civil Service Reform Act of 1978. I understand that certain Administrative Law Judges perform some supervisory responsibility, just as Chief Members do. Since each of the three members of the sections of the Board of Veterans Appeals has an equal vote when it comes to deciding an appeal, the primary responsibility, it would appear reasonable for all to be paid on an equal basis.

I would interpose no objection if it were determined that the Chief Members of the Board of Veterans Appeals are exempt from the provisions of the merit pay under the Civil Service Reform Act of 1978.

SYDNEY J. SHUMAN
Chairman

" - 1. G. Troiano

SJSIUMAN:ism 5/7/80

UNITED STATES OF AMERICA

BEFORE THE MERIT SYSTEMS PROTECTION BOARD
WASHINGTON FIELD OFFICE

IN THE MATTER OF)

APPEAL FROM)

G. TROIANO, et al .)

DECISION NUMBER DC675269H2)

v.)

VETERANS ADMINISTRATION)

The Chief Members of the Board of Veterans Appeals petition the Merit Systems Protection Board (MSPB) to review its decision of February 22, 1980, dismissing our "appeal" for lack of subject matter jurisdiction.

FIRST, THE PETITIONERS ASSERT THAT THE CITED DECISION WAS PREMATURE AND SHOULD BE SET ASIDE.

1. Our communication of December 18, 1979, to the Chief Appeals Officer was not an appeal but rather a request for advice in the matter, preliminary to the submission of arguments on appeal.

2. While lack of jurisdiction may justify a refusal to hear arguments on the merits, it should be recognized that the question of jurisdiction, in and of itself, can be and is the subject of differences of opinion; and that due process requires petitioners be given an opportunity to present arguments on that issue.

3. The MSPB is a creature of recently enacted legislation and, in interpreting the statutes and establishing the boundaries of its jurisdiction, it should proceed with the utmost care. The Board should recognize that decisions made now will become precedent and will be difficult if not impossible to distinguish ~~no matter how~~ ~~worthy a future appeal may be.~~ In the instant case, had the petitioners been given the opportunity to present arguments referable to the question of the Board's jurisdiction, that issue may well have been decided in their favor. Instead, the premature dismissal

of the "appeal," without hearing and weighing our contention that the MSPB in fact has jurisdiction of the question, deprives us of an absolutely essential right in that it shuts the door on what we sincerely believe is our only available avenue for seeking administrative relief.

4. In view of the foregoing, it is suggested that equity and good conscience require the question of jurisdiction be considered de novo.

SECOND, THE PETITIONERS ASSERT THAT THE MSPB HAS JURISDICTION OVER THE MATTER OF OUR INCLUSION IN OR EXCLUSION FROM THE MERIT PAY SYSTEM.

1. Section 202(a) of the Civil Service Reform Act of 1978, which defines the powers and functions of the MSPB, is quite general and extensive. It empowers the Board to hear, adjudicate or provide for the hearing or adjudication of all matters within the jurisdiction of the Board under Title II of the Act, and "any other law, rule or regulation." Given the wide scope of powers that have been granted to the Board in the enabling legislation, is it unreasonable to conclude that the Board has the power to determine whether Government agencies have properly implemented the provisions of the Act which created the Senior Executive Service and the Merit Pay System? We think not!

2. The denial of jurisdiction on the basis that the subject action "does not comprise an adverse action, nor does it fall under any other type of appealable matter as described in 5 C.F.R. 1201.3" is based on the most extremely limited interpretation of Section 202(a) of the Civil Service Reform Act of 1978, i.e., that the subject action is not specifically enumerated under subparagraphs (1) through (8) of 5 C.F.R. 1201.3. It ignores the fact that the preface to the listing states, "This appellate jurisdiction includes:...." (emphasis added) The term "includes" is not restrictive; and,

while it clearly encompasses those actions which are listed, it does not exclude all those other actions which are not enumerated. On the contrary, subparagraph (b) of the same regulation, which deals with "Limitations on appellate jurisdictions" of the Board, does not refer to our action or the subject matter thereof.

3. If we must confine our arguments to those actions specifically enumerated under the provisions of 5 C.F.R. 1201.3, it would not be unreasonable for us to contend that the inclusion of some Members of the Board of Veterans Appeals (Chief Members) in the Merit Pay System and the exclusion of the Law and Medical Members of the same Board from the Merit Pay System is in fact "discrimination" as specifically cited in 5 C.F.R. 1201.3(a)(5).

4. It is discriminatory too for the Office of Personnel Management (OPM) to have provided a double standard for employees dissatisfied with their lot in the Senior Executive Service (SES) and those effected adversely by their inclusion in the Merit Pay System (MPS). For the first group, SES, OPM has provided the right of appeal to the MSPB. However, for those dissatisfied with an MPS decision, OPM finds the "Agency Grievance Systems (are) the proper paths to pursue with regard to any complaints about the System." Such a discriminatory policy adds insult to injury. The Deciding Officials in the Veterans Administration Grievance System are the same officials who made the decision to include Chief Members in the Merit Pay System. To direct an aggrieved party to appeal his grievance to the source of that grievance is to cynically deprive the injured party of any meaningful method for obtaining relief.

5. To correct the last cited obvious inequity, two courses of action are available to the MSPB. It may (a) consider as done that which should have been done and provide to employees in our category the same appellate rights as those given to employees in the Senior

Executive Service, or (b) exercise its authority under the provisions of 5 U.S.C. 1205(a)(4) and review the regulations of the OPM with a view to providing equal rights to all classes of employees.

THIRD, THE PETITIONERS ASSERT THAT, IF A DE NOVO REVIEW IS NOT FOUND TO BE IN ORDER, THE ARGUMENTS ADVANCED UNDER THE SECOND ASSERTION ESTABLISH THAT THE DECISION OF FEBRUARY 22, 1980, WAS BASED UPON AN ERRONEOUS INTERPRETATION OF THE STATUTES AND REGULATIONS.

FOURTH, THE PETITIONERS ASSERT THAT THE ARGUMENTS SET OUT IN OUR "MEMORANDUM TO THE CHAIRMAN, BOARD OF VETERANS APPEALS," FURNISHED WITH OUR LETTER OF DECEMBER 18, 1979, ADEQUATELY SUPPORT OUR APPEAL FOR EXCLUSION FROM THE MERIT PAY SYSTEM ON THE MERITS.

FINALLY, THE PETITIONERS REQUEST AN OPPORTUNITY TO APPEAR AT A FORMAL HEARING BEFORE THE MSPB SO THAT THEY MAY PRESENT ORAL ARGUMENT IN SUPPORT OF THEIR POSITION.

J. Trivins
D. Hardin
C. B. Harris
James J. Butts
Bruce E. Hyman
Elizabeth S. Harris
C. H. Roman
C. P. Turner

B. Standeford
Joseph K. Samuels
Kenneth W. H. H. H.
Richard C. Bennett
James J. O'Kell
Wing H. H. H. H.
Rae Ward
DANIEL J. B. BIERMAN (on leave)

L. P. SUMMERS (on leave)

VETERANS ADMINISTRATION
REFERENCE SLIP

TO (Name or title-Mail routing symbol)		INITIALS-DATE
1.	Asst. Administrator for Personnel (05)	
2.		
3.		
4.		
5.		

REASON FOR REFERENCE

☐ AS REQUESTED☐ COMMENTS☐ CONCURRENCE☐ FOR YOUR FILES☐ INFORMATION☐ NECESSARY ACTION☐ NOTE AND RETURN☐ PER CONVERSATION☐ SIGNATURE

REMARKS

Mr. Wilson has copy. T. McKeever gave me an oral response and I passed it on. They still would like something in writing.

Att.

FROM

SYDNEY J. SHUMAN, Chairman (01)
Board of Veterans Appeals

DATE

4/7/80

TEL. EXT.

VA FORM
AUG 1976 3230

EXISTING STOCKS OF VA FORM 3230,
OCT 1956, WILL BE USED

★ U. S. GPO: 1978-280-573/701

Feb. 6

UNITED STATES GOVERNMENT

Memorandum

DATE APR 7 1980

TO Deputy Administrator, Veterans Administration (001)
 THRU: (1) Chairman, Board of Veterans Appeals (01)
 (2) Assistant Administrator for Personnel (05)
 FROM Chief Members, Board of Veterans Appeals

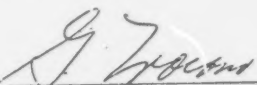
SUBJ Formal Group Grievance; Request for Status Report

1. We initiated informal grievance procedure on February 13, 1980, and filed our formal grievance on February 21, 1980. Applicable regulations state that the Agency is to complete the entire grievance process within 90 calendar days after the initiation of informal grievance procedure and further state that an Examiner is to be appointed by the Agency within 10 calendar days after the filing of the formal grievance. (See MP-5, Part I, Chapter 771, Section C, Paragraphs 2(d)(1) and 7g.)

2. It is now almost two months since we began the grievance process and the Agency still has not appointed an Examiner to conduct an inquiry. In fact, the Deciding Official has not even formally acknowledged receipt of our grievance. We, the Chief Members, respectfully request a Status Report.

3. We have heard informally that serious thought is being given to designating a person from outside Washington to serve as Examiner, but that budgetary constraints are delaying and interfering with such a designation. We wish to state for the record that we do not consider it a matter of particular importance whether the Examiner comes from Central Office or elsewhere. However, as we explained in our grievance petition and in subsequent communications on March 3 and March 10, 1980, we do consider it important that the Examiner be an attorney serving in grade GS-15 or higher.

4. It is requested that this memorandum be made a part of our official grievance file.


 G. TROIANO, for all
 Chief Members (See para. 7
 of grievance)

ADVANCE COPY TO:
 DEPUTY ADMINISTRATOR



Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

VA FORM 2109
 JAN 1977

Rec. 6

UNITED STATES OF AMERICA
BEFORE THE MERIT SYSTEMS PROTECTION BOARD
WASHINGTON FIELD OFFICE

IN THE MATTER OF	)	APPEAL FROM
G. TROIANO, et al	)	DECISION NUMBER <u>DC 75209112</u>
v.	)	
<u>VETERANS ADMINISTRATION</u>	)	

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2. While lack of jurisdiction may justify a refusal to hear arguments on the merits, it should be recognized that the question of jurisdiction, in and of itself, can be and is the subject of differences of opinion; and that due process requires petitioners be given an opportunity to present arguments on that issue.
3. The MSPB is a creature of recently enacted legislation and, in interpreting the statutes and establishing the boundaries of its jurisdiction, it should proceed with the utmost care. The Board should recognize that decisions made now will become precedent and will be difficult if not impossible to distinguish no matter how worthy a future appeal may be. In the instant case, had the petitioners been given the opportunity to present arguments referable to the question of the Board's jurisdiction, that issue may well have been decided in their favor. Instead, the premature dismissal

of the "appeal," without hearing and weighing our contention that the MSPB in fact has jurisdiction of the question, deprives us of an absolutely essential right in that it shuts the door on what we sincerely believe is our only available avenue for seeking administrative relief.

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Joseph K. Summers
Edward W. Hines
Richard C. Picotte
Raymond J. Della
Wing H. Kleinfelder
Rae Wood
 DANIEL J. B. BIERMAN (on leave)

L. P. SUMMERS (on leave)

VETERANS ADMINISTRATION

REFERENCE SLIP

TO (Name or title-Mail routing symbol)	INITIALS-DATE
1. Mr. Mack Fleming, HVAC	
2. 335 Cannon House Office Bldg.	
3.	
4.	
5.	

REASON FOR REFERENCE

☐ AS REQUESTED☐ FOR YOUR FILES☐ NOTE AND RETURN☐ COMMENTS☐ INFORMATION☐ PER CONVERSATION☐ CONCURRENCE☐ NECESSARY ACTION☐ SIGNATURE

REMARKS

Here are copies of BVA requests and response concerning the Chief Members as they pertain to Merit Pay vs SES or complete exclusion.

Encl.

FROM	DATE
Kenneth E. Eaton, Acting Vice Chairman Board of Veterans Appeals	5/1/80
	TEL. EXT. 389-2222

VA FORM 3230
AUG 1976

EXISTING STOCKS OF VA FORM 3230,
OCT 1956, WILL BE USED

★ U. S. GPO: 1979-290-573/781

FEB 25 1980

Deputy Administrator (001)
THRU: Acting Assistant Administrator for Personnel..(05)

Chairman, Board of Veterans Appeals..(01)

Formal Group Grievance; Merit Pay Coverage - Dated February 21, 1980

1. The attached formal grievance is submitted with the following...
endorsements:

- a. The Chief Members do have the authority to effectively recommend promotions, rewards and disciplinary actions.
- b. The Chief Members have a direct influence on the quality of decisions and output of the section. This is a manager's responsibility.

2. I still believe the Chief Members are covered by the Act, however, it will be difficult to get some people to accept the position in view of the possibility of a difference in pay between the Chief and the other two members. They conclude that since the other two members of the section would be entitled to a full raise an injustice is created under the merit pay provisions as the supervisor/manager will receive less unless he/she is awarded a bonus.

SYDNEY J. SHUMAN

SJSHUMAN:et 01 2/25/80

UNITED STATES GOVERNMENT

Memorandum

DATE FEB 5 1980

TO: Chief Members, Section 1 through 16, Board of Veterans Appeals
THRU: Chairman, Board of Veterans Appeals

FROM: Acting Assistant Administrator for Personnel (05).

SUB: Grievance - Merit Pay Coverage

1. This is in response to your memorandum requesting assistance in connection with filing a grievance over the determination that your position is covered under the Merit Pay System.

2. In order to initiate a grievance, the matter must first be raised under the informal procedure with the closest line supervisor with authority to settle the issue, which in this case would be the Chairman of the Board of Veterans Appeals. In proceeding under the informal procedure you should identify, as specifically as possible, the subject of the grievance, the reasons for your dissatisfaction, and the corrective action you desire.

3. If you are not satisfied with the answer under the informal procedure, you may file a formal grievance within 10 calendar days of receipt of that answer. A formal grievance must be in writing and must specify the personal relief you seek. It should be sent through channels to the Deputy Administrator, and must contain the following information:

a. The specific action or incident on which the grievance is based; the date on which it occurred; and the date you first learned of it.

b. The specific reasons why you believe the action was unjustified or that you were treated unfairly; and/or the specific policy, written agreement, or provision violated and how it affected you.

c. The specific corrective action desired.

4. Requests for supporting data should be made to the Chairman or Vice-Chairman of the Board of Veteran Appeals, or to the Chief, Employee Relations Division, Office of Personnel (058A), as appropriate. Any such requests should describe the data sought with sufficient particularity so that it may be readily identified and the request acted upon.

2.

Chief Members, Sections 1 through 16, Board of Veterans Appeals

5. If more than one Chief Member files a formal grievance, the matter may be considered as a group grievance since the grievances will be identical. Under this procedure, the group is asked to designate one case for processing under the grievance procedure and the decision is binding on all members of the group. See MP-5, Part I, Chapter 771, Section C, Paragraph 12.

Martin Wish
for
MARTIN WISH

*noted
MP
2/12/80*

UNITED STATES GOVERNMENT

Memorandum

DATE: 12/13/79

TO: Chief Member, Section 6

FROM: Chairman, Board of Veterans Appeals (01)

SUBJ: Reconsideration of decision to include your position in the Merit Pay System

1. As you requested, I have reviewed my determination to place Chief Members in the Merit Pay System and am constrained to affirm that decision for the following reasons:

o First, since you are not an Administration Law Judge you are not covered by the exclusion from agency recommendations or ratings that cover Administrative Law Judge positions.

o Second, even though a position fails to meet the definition of supervisor, for classification purposes, it may still meet the definition for supervisor as set forth in Labor Management Relations Case Law. Under that definition you can be considered a supervisor for purposes of Merit Pay Coverage if you exercise supervisory functions such as, approving leave, counseling, review work for completeness and correctness, or making work assignments for even one clerical support employee.

o Third, "management officials" are covered by merit pay. Title VII of the Civil Service Reform Act of 1978 defines a management official as, "an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency." (5 U.S.C. 7103 (a)(11)). In paragraph 4 of your memorandum to me, through the Vice Chairman requesting reconsideration you cite several actions that you have the authority to take which very effectively influence the policies of the Veterans Administration.

2. In view of the above I conclude that your position fully meets the definitions of Management Official in title VII of the Civil Service Reform Act of 1978 and Supervisor under the Labor Relations definition and must be covered by the Merit Pay System.

3. I am sorry that my decision could not be more in line with your wishes. If you would like to pursue this beyond my decision you may do so through the agency grievance procedure contained in MP-5, Part I, Chapter 771. You may seek help on the necessary procedural requirements for a grievance from Mr. Butler in the Employee-Relations and Training Division of Central Office Personnel Service should you wish to proceed beyond this step.

Sydney J. Shuman

SYDNEY J. SHUMAN



Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

VA FORM 3105
JAN 1977

UNITED STATES GOVERNMENT

Memorandum

DATE DEC 17 1979

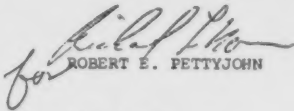
TO Chairman, Board of Veterans Appeals

FROM Director, Central Office Personnel Service

SUBJ Advisory regarding request for reconsideration of decision to include GS-15 Chief Member positions in the Merit Pay System

1. As Chief Members, incumbents meet the Labor-Management Relations definition for supervisor. In meeting this definition, it is appropriate for these positions to be incorporated into the Merit Pay system.

2. In reviewing the other GS-15 positions located in the Board of Veterans Appeals my staff has found that they meet the definition for management official set forth in Title VII of the Civil Service Reform Act of 1978. I understand you have initially excluded these positions from Merit Pay System Coverage. Positions meeting the definition of a management official would normally be covered under the Merit Pay System.


ROBERT E. PETTYJOHN

Attachment



Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

VA FORM 2105
JAN 1977

DELETED
SYSTEMS
PROTECTION
BOARD

Washington, D.C. Field Office
 Washington, D.C. 20419

In Reply Please Refer to:

Your Reference:

Sydney J. Shuman
 Chairman, Board of Veterans Appeals
 Veterans Administration
 Washington, D.C. 20420

SEP 20

There is transmitted herewith a copy of the findings and recommendation in the appeal described below:

APPEAL OF:	Sydney J. Shuman
ACTION APPEALED:	Senior Executive Service
EMPLOYING AGENCY:	Veterans Administration
DECISION:	Not Within Purview

Sincerely yours,

Thomas J. Lemphear
 Chief Appeals Officer

cc: Richard D. Brady
 Assistant Administrator for Personnel
 Veterans Administration
 Office of the Assistant Administration for Personnel
 Washington, D.C. 20420

Enclosure

UNITED STATES OF AMERICA
BEFORE THE MERIT SYSTEMS PROTECTION BOARD
WASHINGTON FIELD OFFICE

IN THE MATTER OF	)	
	)	
SYDNEY J. SHUMAN	)	Decision Number <u>DC 031709008</u>
	)	
V.	)	Date <u>September 28, 1979</u>
	)	
<u>VETERANS ADMINISTRATION</u>	)	

INTRODUCTION

On August 2, 1979, Mr. Shuman filed an appeal from the decision of the Veterans Administration denying his request for inclusion in the Senior Executive Service (SES) of sixteen positions for Chief Members of the Board of Veterans Appeals.

JURISDICTION

Section 413 of the Civil Service Reform Act (Pub. L. 95-454; 92 Stat. 1175, 1978) provides for designation of certain positions in an agency as Senior Executive Service positions and for conversion of incumbents of those positions to the SES. Subsection (j) thereof provides that an employee who is "aggrieved by any action by any agency under this section is entitled to appeal" to the Board. The question of the Board's jurisdictional purview in any given case therefore turns on whether an appellant is "aggrieved" as contemplated by section 413(j) of the Reform Act.

In the instant case, appellant is the Chairman of the Board of Veterans Appeals and has filed an appeal on behalf of the 16 Chief Members of the Board. As appellant would not be personally affected by the action in question, I find he is not an aggrieved employee as contemplated under the provisions of section 413(j), and therefore has no right of appeal to the Board.

Assuming, arguendo, that appellant is acting as representative for the individuals holding the positions of Chief Member, and that they may, on an individual basis, have a right of appeal, we arrive at a further question of jurisdiction.

Section 3132(a)(2) of Title 5 of the United States Code defines a Senior Executive Service position as follows:

-2-

- (2) "Senior Executive Service position" means any position in an agency which is in GS-16, 17, or 18 of the General Schedule or in level IV or V of the Executive Schedule or an equivalent position, which is not required to be filled by an appointment by the President by and with the advice and consent of the Senate, and in which an employee--
- (A) directs the work of an organizational unit;
 - (B) is held accountable for the success of one or more specific programs or projects;
 - (C) monitors progress toward organizational goals and periodically evaluates and makes appropriate adjustments to such goals;
 - (D) supervises the work of employees other than personal assistants; or
 - (E) otherwise exercises important policy-making policy-determining, or other executive functions;

Although appellant claims that these positions should have been raised to the GS-16 level prior to the enactment of the Civil Service Reform Act, the Veterans Administration has concluded that these positions were not properly classifiable above the GS-15 level, and this is the level at which they are currently classified. Accordingly, as the Board has no personal jurisdiction over the incumbents of these positions, I find the matter appealed is not within the purview of our appellate jurisdiction.

DECISION

The appeal is hereby dismissed.

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on November 2, 1979 unless a petition for review is filed with the Board within thirty-five (35) calendar days after the petitioner's receipt of this decision.

Any party to this appeal or the Director of the Office of Personnel Management may file a petition for review of this decision with the Merit Systems Protection Board. The petition must identify specifically the exception taken to this decision, cite the basis for exception, and refer to applicable law, rule, or regulations.

The petition for review must be received by the Secretary to the Merit Systems Protection Board, Washington, D.C., 20419 no later than thirty-five (35) calendar days after receipt of this decision.

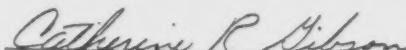
The Board may grant a petition for review when a party submits written argument and supporting documentation which tends to show that:

-3-

- (1) New and material evidence is available that despite due diligence was not available when the record was closed; or
- (2) The decision of the presiding official is based upon an erroneous interpretation of statute or regulation.

Under 5 U.S.C. 7703(b)(1), the appellant may petition the United States Court of Appeals for the appropriate circuit or the United States Court of Claims to review any final decision of the Board provided the petition is filed no more than thirty (30) calendar days after receipt.

For the Board:


Catherine R. Gibson
Presiding Official

UNITED STATES GOVERNMENT

Memorandum

DATE FEB 21 1980

TO Deputy Administrator, Veterans Administration (001)
 THRU: (1) Chairman, Board of Veterans Appeals (01)
 (2) Acting Administrator for PERSONNEL (05)

FROM Chief Members, Board of Veterans Appeals

SUBJ: Formal Group Grievance; Merit Pay Coverage

1. Background: On December 18, 1979, the Chief Members, Board of Veterans Appeals, notified VA Personnel officials in writing that we intended to initiate grievance procedures and requested assistance. (See Tab A) On February 5, 1980, the Acting Assistant Administrator for Personnel replied. In pertinent part, he recommended that informal grievance procedure be initiated with the Chairman, Board of Veterans Appeals, and that thereafter, if still not satisfied, a formal grievance be forwarded to the Deputy Administrator, as the appropriate deciding official for this particular grievance. (See MP-5, Part I, Chapter 771, Section C, paragraph 4) We are following the suggested procedure.

2. Informal Grievance Procedure Completed: On February 13, 1980, all Chief Members, or their representatives, met with the Chairman, Board of Veterans Appeals. During the course of that meeting, the Merit Pay grievance was presented pursuant to informal procedure as required by MP-5, Part I, Chapter 771, Section C, Paragraph 6. Such presentation was made orally as authorized by Paragraph 5a. During the course of the same meeting, the Chairman responded that he was unable to provide the relief sought. The Chairman's answer and decision with respect to the informal grievance was made orally as authorized by Paragraph 5d.

3. Specific Action on Which Grievance is Based: On December 3, 1979, the Vice Chairman, Board of Veterans Appeals, advised Mr. G. Troiano as well as all other Chief Members in writing that his Chief Member position would be included in the Merit Pay System under the Civil Service Reform Act of 1978 because it met the definitions of supervisor/manager. (See Tab B) Thereafter, on December 6, 1979, all sixteen Chief Members requested the Chairman, Board of Veterans Appeals, to reconsider the decision that we be included in the Merit Pay System. (See Tab C) On December 18, 1979, G. Troiano received an undated memorandum signed by the Chairman wherein he affirmed the decision to include Chief Members in the Merit Pay System. (See Tab D) Because of the above-described reconsideration procedure, the usual time limit of 15 calendar days between the complained of action (December 3, 1979) and the filing of an informal grievance (February 13, 1980) is not applicable. (See INTERIM ISSUE 00-79-31, Paragraph D 8) Moreover, inclusion in the Merit Pay System constitutes a continuing condition subject to a grievance at any time. (See MP-5, Part I, Chapter 771, Section C, Paragraph 5b)



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VA FORM 2005

4. Legal Reasons Why Inclusion of Chief Members in Merit Pay System is Unjustified: The Civil Service Reform Act of 1978 establishes a Merit Pay System based on a Performance Appraisal System which includes periodic appraisals of job performance. (See 5 U.S.C. 4302 and 5401) The Merit Pay System "shall apply to any supervisor or management official (as defined in paragraph (10) and (11) of Section 7103 of this title, respectively) who is in a position which is in GS-13, 14, or 15 of the General Schedule described in Section 5104 of this title." (Underscoring added)

a. Supervisor: The Chairman in his affirmation of the decision to include us in the Merit Pay System states that we come within the definition of supervisor "as set forth in Labor Management Relations Case Law." (See Tab D) We reject this argument as inappropriate. The cited case law is clearly inapplicable to our situation since it applies, for the most part, to union matters, such as eligibility to participate in a union election, etc. Moreover, there is no need whatsoever to look to case law or elsewhere because the Civil Service Reform Act itself defines supervisor as an individual "having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action." (See 5 U.S.C. 7103(a)(10)) Based on the way the BVA is organized and run, we simply do not come within the parameters of that congressionally mandated definition. (See paragraph 5b below for further elaboration.)

b. Additional Comments on "Supervisor": The definition of supervisor set forth in the preceding subparagraph includes the following final clause: "except that, with respect to any unit which includes firefighters or nurses, the term 'supervisor' includes only those individuals who devote a preponderance of their employment time to exercising such authority." (Underscoring added) Even if an arbitrary determination is made by competent authority that Chief Members do, in fact, perform some of the supervisory functions enumerated in the preceding subparagraph, we maintain that we still do not come within the meaning of the term "supervisor" as used in the Civil Service Reform Act. This is because our primary duties and responsibilities are to perform highly technical and specialized

- 3 -

functions; that such primary duties and responsibilities consume 95 per cent or more of our time; and that supervisory duties, if any, are minor and incidental to our basic function, i.e., deciding appeals. The above-quoted final clause of the definition of supervisor constitutes a clear signal of Congressional intent to exclude such persons as ourselves from the definition of supervisor.

c. Management Official: The Civil Service Reform Act defines management official as "an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency." (See 5 U.S.C. 7103(a)(11)) The Chairman in his affirmation of the decision to include us in the Merit Pay System states that, in our request for reconsideration, we cite several actions that we have the authority to take" which very effectively influence the policies of the Veterans Administration." (See Tabs C&D) At first glance this appears to be an appropriate retort; however, we reject that argument as inappropriate. Chief Members are quasi-judicial officials (as distinguished from management officials). All Board Members, including Chief Members, are fully bound by VA regulations, Administrator's Decisions, and precedent decisions of the General Counsel. (See 38 U.S.C. 4004(c)) In order to maintain judicial independence, it is firm policy that no Board Member participate in the formulation of changes in or additions to VA Regulations. Proposed changes or additions are not even routed to Board Members for comment. It is true, as stated in our request for reconsideration, that in connection with a specific appeal by a specific appellant a Board Section (as distinguished from a Chief Member), has authority to ignore or override the opinions and/or decisions of certain VA officials as reflected in various internal publications. Such a decision by a Board Section has absolutely no effect at all beyond the specific appellant involved; it does not change or cancel the policy. Nor can it be said that such decision may "influence" policy changes. In summary, it is incorrect to say that we, as Chief Members, are required or authorized to formulate, determine, or influence agency policies.

d. Professional Employees: In addition to the crystal clear language used to define supervisor and management official, the text of the Civil Service Reform Act contains additional persuasive evidence of intent with respect to inclusion in or exclusion from the Merit Pay System. The very same subchapter of the Act which defines supervisor and management official also defines Professional Employee as "an employee engaged in the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital...; requiring the consistent exercise of discretion and judgment in its performance; which is predominantly intellectual and varied in character; and which is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time." (See 5 U.S.C. 7103(a)(15)) We, the Chief Members, categorically deny that the duties and functions performed by Board Members, including Chief Members, extend beyond the parameters of the definition of professional employee. The intent of the Congress not to include such employees in the Merit Pay System is obvious and beyond argument.

5. Additional Reasons Why Inclusion of Chief Members in the Merit Pay System is Unjustified: The reasons for excluding Chief Members set forth in paragraph 4 above are technical and legal in nature. However, there are additional common sense reasons which concern basic unfairness, inequality of treatment, and serious compromise of judicial independence:

a. BVA Organization: The purpose of the Board of Veterans Appeals and the duty and responsibility of all Board Members is (1) to review appeals originating at the regional office level, (2) to decide whether a veteran (or other party) is or is not entitled to various VA benefits, and (3) to promulgate a written opinion explaining the decision and reasons therefor. (See 38 U.S.C. 4004) Except for insurance cases, decisions of the Board are final and are not subject to review by the courts. (See 38 U.S.C. 211(a)) All Board Members are either attorneys or physicians. The Chairman and Vice Chairman (both attorneys) elected to enter the Senior Executive

- 5 -

Service. The other Board Members, including Chief Members, are GS-15's. Board Members are appointed by the Administrator with the approval of the President. (38 U.S.C. 4001) Last year over 34,000 cases were adjudicated by the BVA. In order to be able to accomplish this significant feat, the Board Membership is divided into 16 Board Sections. Each Board Section is composed of three Board Members: A Chief Member, who is an attorney, a Legal Member, and a Medical Member (or in the case of one section, an additional Legal Member). Each Section is expected to turn out at least 8 cases per working day. In practice, many Sections meet the goal; other Sections exceed the goal; and still other Sections do not reach the assigned goal. To assist the three Board Members in the task of meeting this goal, the Chairman or Vice Chairman assigns six or seven staff attorneys (ranging from GS-9 to GS-14) and a secretary to each Section. As will be explained in greater detail below, with respect to personnel assigned to each Section, the Chief Member functions as a Group Leader (as distinguished from a supervisor as defined by the Civil Service Reform Act).

b. Basic Unfairness: As we understand it, Chief Members, for Merit Pay purposes, are to be evaluated on the basis of the number of cases produced by our respective Sections and by the quality of those decisions as determined by a single individual (selected by and responsible to the Chairman) based on that individual's random review of a small number of cases selected on the basis of claim number digits. We reject this system as inappropriate (See paragraph 5d below) and as inherently unfair. Section production and quality do not depend to any significant degree on a Chief Member's leadership ability, managerial acumen, legal expertise, or even willingness to work long and hard. Section production and quality, in very large measure, depend on the talents of the attorneys assigned to our respective Board Sections. As is the case in any large group, the talents of individual BVA staff attorneys with respect to speed, writing ability, and expertise in VA law and regulations vary considerably. Chief Members have no authority whatsoever to hire, assign, promote, reward, transfer, suspend,

significantly discipline, etc, the attorneys or even the secretary assigned to our respective Sections. Even the cases the staff attorneys are assigned and directed to work on and the jurisdiction of each Section are, for the most part, selected by a centralized authority outside the Section. Moreover, it cannot realistically be said that we have authority to "effectively recommend" the actions enumerated in the preceding two sentences. This is because the Chairman and Vice Chairman are under no obligation whatsoever to seek our advice prior to such decisions nor are they in any way required to give any weight at all to our requests or suggestions with respect thereto. In summary, too much authority is accruing to the Chairman and Vice Chairman under the Merit Pay System and this cannot help but compromise our decisional independence. (See paragraph 5d below) The potential threat is clear and well understood! For example, the Chairman, for whatever reason, could arbitrarily assign less talented attorneys to a Board Section or change the Section's jurisdiction and then subsequently penalize the Chief Member financially when such actions adversely affect the Section production, or quality, or both. The unfairness of the situation is manifest; we are being subjected to evaluations based on factors (production and quality) over which we have little personal control at present. If we are forced to become a part of the Merit Pay System, we intend to file an additional grievance requesting significant changes in the internal operations of the Board of Veterans Appeals. If we are to be held financially accountable as supervisors, then fairness and equity dictate that we must have the authority to function as supervisors.

c. Inequality of Treatment: It is true that Chief Members perform certain Group Leader functions such as approval of leave and preparation of quarterly evaluations of staff attorneys assigned to their Section. However, none of these functions comes within the parameters of the definition of supervisor as clearly set forth in the Civil Service Reform Act, and even these minor functions are closely circumscribed by oral and written instructions from the Chairman and Vice Chairman and the input

**INTENTIONAL
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of the Associate Member. Except for these minor functions, the duties and responsibilities of Board Membership are essentially the same for Chief Members, Legal Members, and Medical Members. In fact, the former Civil Service Commission specifically ruled that the additional duties performed by the Chief Members are insufficient to justify a difference in GS grade level. Under the Merit Pay System, we the Chief Members, will no longer receive within-grade step increases or quality step increases. (See 5 U.S.C. 5402(b)(4)) In addition, because of production and quality factors essentially beyond our personal control, we may also end up receiving less than full annual comparability adjustments and be ineligible for any bonuses under the Merit Pay System. At the very same time that this is happening to us, our two Board Member colleagues (who share our office, review and vote on the very same cases, and work with the same assigned staff attorneys) will continue to receive within-grade step increases and full annual comparability adjustments. This clear inequality of treatment is yet another aspect of the basic unfairness of the situation as discussed at some length in the preceding subparagraph.

d. Judicial Independence: For many years, Administrative Law Judges (and their predecessor Hearing Examiners) have been exempted from the operation of the efficiency rating system. The applicable law provides that they are entitled to prescribed pay "independently of agency recommendations or ratings." (See 5 U.S.C. 5372) The Civil Service Reform Act continued the exemption and thus excluded Administrative Law Judges from the provisions of the Merit Pay System. This legislative history clearly shows the intent of Congress to insulate and protect the decisional independence of quasi-judicial officials. For the best interests of all concerned, it is more important that they be "independent" than "responsive." As we emphasized in our request for reconsideration, the Board's decisions (with minor exceptions) are not subject to the scrutiny of the Courts as are those of Administrative Law Judges. (38 U.S.C. 211(a), 4004(a)) Therefore, we are

entitled to the same or greater insulation, certainly not less. It is axiomatic that the power of financial reward or the withholding thereof carries with it an inherent capacity to exercise a very strong influence. We, the Chief Members, believe it is essential that the integrity of our adjudicative process be preserved through the exercise of unrestricted decisional independence. We are firmly convinced that the integrity of our highly prized and jealously guarded decisional independence will be greatly compromised by our inclusion in the Merit Pay System. Moreover, such obvious compromise cannot help but generate an adverse reaction in the Congress, among the Service Organizations, and among well informed veterans.

6. Specific Corrective Action Desired: Either of two alternative corrective actions are strongly urged:

a. Appropriate VA officials should determine that Chief Members are excluded from the Merit Pay System because they are not "supervisors" or "management officials" as defined in the Civil Service Reform Act. Such determination is clearly warranted because of the reasons set forth in paragraphs 4 and 5 above.

b. Pursuant to 5 U.S.C. 4301(2)(g) and 5401(a)(2)(c), the Administrator should apply to the Office of Personnel Management for exclusion of Chief Members from the Performance Appraisal and Merit Pay Systems. For the reasons set forth in the preceding paragraphs; particularly paragraph 5, such application is clearly in the best interests of the veterans served by the BVA. It is our understanding that such an application has been forwarded by the Social Security Appeals Council, an appellate body performing functions analogous to those of the BVA.

7. Group Grievance Procedure: Since all Chief Members have an identical grievance, it is requested that this grievance be processed as a group grievance pursuant to MP-5, Part I, Chapter 77, Section C, Paragraph 12. G. Troiano is designated as the individual to have his case processed as a representative of the entire group.

8. Examiner: Section C, Paragraph 7g, provides that the Deciding Official will refer the grievance for inquiry by an examiner within 10 calendar days from the date the formal grievance is filed. Because of the importance and complexity of the issues and the seniority of the persons involved, it is requested that the examiner be very

carefully selected and completely relieved of his usual duties for a sufficient period of time to allow him to conduct a thorough inquiry and that he be an attorney in grade GS-15 or higher.

9. Morale: Section C, Paragraph 2 (d)(1) provides that a decision on a grievance is to be issued within 90 calendar days after initiation of the informal grievance procedure. In order to prevent further deterioration in morale caused by the factors explained in paragraph 5 above, it is urged that this grievance be processed without delay and resolved satisfactorily. It is our intention to file a written request for a status report at the expiration of each time limit stated in Section C, Paragraph 2(d)(1), such as 10 calendar days for referral to examiner, 45 calendar days for completion of examiners' inquiry, etc.

10. Reservations: We, the Chief Members, reserve the right to further develop and elaborate the arguments set forth in paragraphs 4 and 5 above during the course of the examiner's inquiry, to request various documents and information from VA and BVA officials to support our arguments, and to include as parties to this grievance any person or persons designated as a Chief Member while this grievance is pending. In addition, pursuant to MP-5, Part I, Chapter 771, Section A, Paragraph 2b(3), we reserve the right to utilize a reasonable amount of official time to perfect and pursue this grievance.

R. B. STANLEY
R. B. STANLEY

D. BIERMAN
D. BIERMAN

R. T. WOOD
R. T. WOOD

R. K. BAUER
R. K. BAUER

S. W. NARVER
S. W. NARVER

G. TROIANO
G. TROIANO

D. E. LANDERS
D. E. LANDERS

W. B. MORRIS
W. B. MORRIS

E. L. ARPIN
E. L. ARPIN

J. J. BUTLER
J. J. BUTLER

K. J. WELLS
K. J. WELLS

C. D. ROMO
C. D. ROMO

L. P. SUMMERS
L. P. SUMMERS

P. KUBAT
P. KUBAT

R. A. PICCIOTTI
R. A. PICCIOTTI

F. F. FARRIS
F. F. FARRIS

I. KLEINFELD
I. KLEINFELD

UNITED STATES GOVERNMENT

Memorandum

DATE: December 18, 1979

TO: The Assistant Administrator for Personnel (05)
Thru: The Director, Central Office Personnel Service (005) *B*

FROM: Chief Members, Board of Veterans Appeals

SUBJ: Appeal of Adverse Action

1. This has reference to the decision to include the Chief Members of the Board of Veterans Appeals in the Merit Pay System.
2. Attached hereto are self-explanatory copies of (a) the Notice of the action dated December 3, 1979, (b) our Memorandum to the Chairman, Board of Veterans Appeals requesting reconsideration of that decision and (c) the Chairman's reply received December 17, 1979.
3. It is our intention to appeal this decision through the grievance procedure contained in MP-5, Part 1, Chapter 771. Your assistance in the matter of preparing supporting data will be appreciated.

Att: (3)

B. J. Hennis
Paul J. Wood
Elizabeth S. Cain
Ronald C. Picinotti
D. Landon on ltr
J. P. Hennis on ltr

J. W. Hennis
W. J. Hennis
W. J. Hennis
W. J. Hennis
Charles D. Hennis
J. B. Hennis
W. J. Hennis
W. J. Hennis
W. J. Hennis
W. J. Hennis

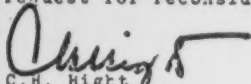


EEO 4 157s

Dear Mr. Troiano:

This letter is to notify you that your position has been reviewed to determine whether it should be included in the Merit Pay System under the Civil Service Reform Act. Your position will be included because it meets the definitions for supervisor/manager under the Supervisory Grade Evaluation Guide/Labor Management Relations Definitions.

If you do not agree with the determination you have a right to request reconsideration. This request for reconsideration must be made within five (5) calendar days after receipt of this notification. Your request must be in writing and should be sent through normal channels to the Chairman, Board of Veterans Appeals who is the reconsideration official. He will issue a decision within ten (10) calendar days after receipt of your request for reconsideration.


C.H. Hight
Vice Chairman

UNITED STATES GOVERNMENT

Memorandum

DATE: 7/1/79

TO: The Chairman, Board of Veterans Appeals
 Thru: The Vice Chairman, Board of Veterans Appeals

FROM: Chief Members, Board of Veterans Appeals

SUBJ: Request for Reconsideration of Merit Pay System Status

We the undersigned Chief Members, Board of Veterans Appeals, respectfully request that you reconsider the decision to include us in the Merit Pay System.

The Civil Service Reform Act of 1978, apparently enacted to make the federal service more responsive to the Chief Executive and his designates, has specifically excluded from its provisions Administrative Law Judges, whose duties and responsibilities are almost identical to ours. It is apparent from this action that the Congress considers it more important for quasi-judicial officers to be "independent" than "responsive."

Since the Board's decisions are not subject to the scrutiny of the Courts, as are those of Administrative Law Judges, the matter of independence is far more important to our operation than theirs. We are therefore entitled to the same or greater insulation, not less. From par. 9 of your memorandum of May 14, 1979, to the Administrator of Veterans Affairs, it is apparent you are aware of the inequity of treating us differently.

Not having been specifically excluded from the provisions of the Civil Service Reform Act, as have our peers the Administrative Law Judges, and having been denied inclusion in the Senior Executive Service by the Assistant Administrator for Personnel, we find it demeaning to the B.V.A., as a whole, and to us in particular, to be included in the lesser category, the Merit Pay System. This is particularly offensive when one considers that the Board is the final arbiter of benefits' disputes and has the authority to ignore or override the opinions and/or decisions of officials in the Senior Executive Service. Your par. 4 of the cited memorandum to the Administrator shows you are also aware of this.

We have, nevertheless, been included in the Merit Pay System on a technicality, a specific definition of "supervisor/manager," cited in the Vice Chairman's Notice of December 3, 1979. We are not aware of that definition and the demands of our positions and the brief time allowed to reply do not permit the necessary research and study. We are, however, familiar with the definition of "supervisor," included in the Federal Personnel Manual and Circular 00-79-33, dated July 25, 1979. We categorically deny that we perform the functions specified therein. The pressure of the decision making process and the weekly production goal of 40 final appellate decisions, preclude more than a minimal amount of



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VA FORM 2105
JAN 1977

**VETERANS ADMINISTRATION
REFERENCE SLIP**

TO (Name or title—Organizational element—Room No. and bldg.)		INITIALS—DATE
1. Mr. Kleinfeld	Mr. Arpin	
Mr. Standefer	Mr. Wells	
2. Mr. Butler	Mr. Romo	
Mr. Warner	Mr. Summers	
3. Mr. Eaton	Mr. Kubat	
Ms. Wood	Mr. Picciotti	
4. Mr. Bauer	Ms. Parris	
Mr. Troiano	✓ Mr. Donsbach	
5. Mr. Landers	Mr. Derhaag	
Mr. Morris	Mr. Blasingame	

REASON FOR REFERENCE

- | | | |
|---|---|---|
| ☐ APPROVAL | ☐ CONCURRENCE | ☐ NOTE AND RETURN |
| ☐ AS REQUESTED | ☐ FOR YOUR FILES | ☐ PER CONVERSATION |
| ☐ CALL ME | ☐ INFORMATION | ☐ RECOMMENDATION |
| ☐ COMMENTS | ☐ NECESSARY ACTION | ☐ SIGNATURE |
| ☐ PREPARE REPLY FOR SIGNATURE OF | | |

REMARKS

Attached are guidelines now being used in developing performance standards and identifying critical elements. This material is being circulated for your general information.

You will soon be officially notified that you are one of the GS-15 employees covered by the Merit Pay System. A set of performance standards (including key responsibilities and critical elements) for each GS-15 supervisory position on the Board is now on file in the office of the Vice Chairman. If you have any questions about the performance standards for your position, please contact me or Mr. Hight or Mr. Eaton.

After the initial performance appraisal period (January 1, 1980 thru July 31, 1980) we will reexamine the performance standards and see what adjustments should be made. *We will work together.*

FROM

Sydney J. Shuman
SYDNEY J. SHUMAN
CHAIRMAN

DATE

11/30/79

TEL. EXT.

*Personnel &
Salaries*

NOV 30 1979

Director, Central Office Personnel Service (055A)

Chairman, Board of Veterans Appeals (01D)

Identification of Merit Pay Positions

1. The Following GS-15 employees on the Board are to be included in the Merit Pay System under the Civil Service Reform Act:

Irving Kleinfeld,	Supr. Attorney-Examiner/Veterans,	03047A
Richard B. Standefer,	Supr. Attorney-Examiner/Veterans,	03047A
Rae T. Wood,	Supr. Attorney-Examiner/Veterans,	03047A
Roger K. Bauer,	Supr. Attorney-Examiner/Veterans,	03047A
Samuel W. Warner,	Supr. Attorney-Examiner/Veterans,	03047A
Generoso Troiano,	Supr. Attorney-Examiner/Veterans,	03047A
David T. Lauders,	Supr. Attorney-Examiner/Veterans,	03047A
Woodrow B. Morris,	Supr. Attorney-Examiner/Veterans,	03047A
Edward L. Arpin,	Supr. Attorney-Examiner/Veterans,	03047A
James J. Butler,	Supr. Attorney-Examiner/Veterans,	03047A
Kenneth J. Wells,	Supr. Attorney-Examiner/Veterans,	03047A
Charles D. Romo,	Supr. Attorney-Examiner/Veterans,	03047A
Levis P. Summers,	Supr. Attorney-Examiner/Veterans,	03047A
Joseph P. Kubat,	Supr. Attorney-Examiner/Veterans,	03047A
Romulus A. Picciotti,	Supr. Attorney-Examiner/Veterans,	03047A
Elizabeth F. Parris,	Supr. Attorney-Examiner/Veterans,	03047A
Kenneth E. Eaton	Supr. Attorney-(Classification pending)	
Jack W. Blasingame,	Attorney-Adviser/Veterans,	118000
James J. Derhaag,	Special Assistant,	040910
Jan Stefan J. Donsbach,	Attorney-Adviser/Veterans,	023250

2. The following GS-15 employees on the Board are not to be included in the Merit Pay System:

Howard J. Schlegel,	Attorney-Adviser/Veterans,	03053A
Warren W. Rice, Jr.,	Attorney-Adviser/Veterans,	03053A
Horace C. Adams, Jr.,	Attorney-Adviser/Veterans,	03053A
James U. Johnson,	Attorney-Adviser/Veterans,	03053A
Craig P. Russell,	Attorney-Adviser/Veterans,	03053A
Richard K. Malamphy,	Attorney-Adviser/Veterans,	03053A
Edward R. Standford, Jr.,	Attorney-Adviser/Veterans,	03053A
Eugene O'Neill,	Attorney-Adviser/Veterans,	03053A
Johanna M. Giordani,	Attorney-Adviser/Veterans,	03053A
John J. Schule, III,	Attorney-Adviser/Veterans,	03053A
Bruce E. Hymen,	Attorney-Adviser/Veterans,	03053A
Eileen M. Krenser,	Attorney-Adviser/Veterans,	03053A
Daniel J. Bierman,	Attorney-Adviser/Veterans,	03053A
Ernest B. Wright,	Attorney-Adviser/Veterans,	03053A
William T. Bundy, Jr.,	Attorney-Adviser/Veterans,	03053A

KZEaton/as/11/28/70

CTU

Page - 2 - MEMO-Director, Central Office Personnel Service (055A)

Patsy M. Fiandaca,	Medical Officer, GP/Disab. Eval,	03039A
Roy G. Klepser,	Medical Officer, GP/Disab. Eval,	03049A
Constance A. Windsor,	Medical Officer, GP/Disab. Eval,	03049A
Mary F. Marzolf,	Medical Officer, GP/Disab. Eval,	03049A
Gordon R. MacDonald,	Medical Officer, GP/Disab. Eval,	03049A
Robert L. Simpson,	Medical Officer, GP/Disab. Eval,	03049A
Donald H. Leeper,	Medical Officer, GP/Disab. Eval,	03049A
E.H. Bauersfeld,	Medical Officer, GP/Disab. Eval,	03049A
Charles E. Edwards,	Medical Officer, GP/Disab. Eval,	03049A
Brooks G. Brown,	Medical Officer, GP/Disab. Eval,	03049A
Thomas H. Wells,	Medical Officer, GP/Disab. Eval,	03049A
Jerry R. Kennedy,	Medical Officer, GP/Disab. Eval,	03049A
George W. Sgalitzer,	Medical Officer, GP/Disab. Eval,	03049A
John G. Feder,	Medical Officer, GP/Disab. Eval,	03049A
 Roscoe Creer,	 Medical Officer, GP/Disab. Eval,	 04243A
Jacob J. Weinstein,	Medical Officer, GP/Disab. Eval,	04243A
Donald W. Ingham,	Medical Officer, GP/Disab. Eval,	04243A
Ralph D. Whitley,	Medical Officer, GP/Disab. Eval,	04243A

3. Each individual listed above will receive written notice of his/her inclusion or exclusion from the Merit Pay System.

SYDNEY J. SHUMAN

REHaton/as/11/28/79

01D

UNITED STATES GOVERNMENT

Memorandum

DATE November 20, 1979

TO Department and Staff Office Heads

FROM Director, Central Office Personnel Service (055)

SUBJ Identification of Merit Pay Positions

1. Your office is currently identifying all GS-15 positions within your organization which are subject to the Merit Pay provisions of the Civil Service Reform Act. In the next few months you will be doing the same thing for GS-13 and GS-14 positions.
2. My staff is available to assist you in these determinations. In the case of the GS-13 and GS-14's, we will send recommendations to you later. Since time is short for identification of the GS-15's my classification staff will welcome phone calls to resolve any problems you may have.
3. When the determinations have been made, please send to this office, (055A), a listing of determinations to include or exclude, by organization, giving position title, grade and position number. ✓
4. When your review and determination to include or exclude positions in Merit Pay is completed, you should notify each incumbent of your determination following the guidelines in the Interim Issue. A suggested format for this notification is attached.

Robert E. Pettyjohn
ROBERT E. PETTYJOHN

Attachment

*Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan*VA FORM 2105
JAN 1977

1632
21 Copies

Copy to each chief Member
Blas
Derhaug
Donetach

VETERANS ADMINISTRATION
REFERENCE SLIP

TO (Name or title-Mail routing symbol)				INITIALS-DATE
1. ✓ 01	6. 06	11. 20	16. 70	
2. 02	7. 07	12. 30		
3. 03	8. 08	13. 40		
4. 04	9. 09	14. 50		
5. 05	10. 10	15. 60		

REASON FOR REFERENCE

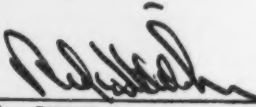
☐ AS REQUESTED	☐ FOR YOUR FILES	☐ NOTE AND RETURN
☐ COMMENTS	☐ INFORMATION	☐ PER CONVERSATION
☐ CONCURRENCE	☐ NECESSARY ACTION	☐ SIGNATURE

REMARKS

SUBJ: Implementation of the Merit Pay
System in the VA

The attached TWX was approved and transmitted
this date. Please advise appropriate
elements under your jurisdiction.

Attachment

FROM 
RUFUS H. WILSON
Deputy Administrator (001)

OCT 25 1979

TEL. EXT.

VA FORM
AUG 1976 3230

EXISTING STOCKS OF VA FORM 3230,
OCT 1969, WILL BE USED UNTIL Government Printing Office 1979-500-400

TELEGRAPHIC MESSAGE

NAME OF AGENCY VACO, WASH, DC		PRECEDENCE ACTION P INFO.	SECURITY CLASSIFICATION
ACCOUNTING CLASSIFICATION		DATE PREPARED 10/2/79	TYPE OF MESSAGE ☐ SINGLE ☒ BOOK ☐ MULTIPLE-ADDRESS
FOR INFORMATION CALL			
NAME GARY E. KING (05A)		PHONE NUMBER 2753	
THIS SPACE FOR USE OF COMMUNICATION UNIT PLEASE RESTRICT TEXT OF THIS MESSAGE TO A MAXIMUM OF 69 CHARACTERS PER LINE			
MESSAGE TO BE TRANSMITTED (Use double quoting and all capital letters)			
TO: ALFLD /00/ SPECIFIC INSTRUCTION RELATING TO IDENTIFICATION OF MERIT PAY SYSTEM POSITIONS WILL BE ISSUED SHORTLY. EARLY IDENTIFICATION OF MERIT PAY POSITIONS WILL BE NECESSARY TO PROVIDE INFORMATION FOR PLANNING PURPOSES. IT IS ESSENTIAL, HOWEVER, THAT SUFFICIENT TIME BE ALLOWED TO FULLY DEVELOP A SOUND MERIT PAY SYSTEM WHICH CAN BE ADEQUATELY TESTED, THAT WILL BE CREDITABLE, THAT WILL BE UNDERSTOOD AND THAT WILL HAVE THE CONFIDENCE OF BOTH MANAGEMENT AND EMPLOYEES ALIKE. IT HAS THEREFORE BEEN DECIDED THAT ALL GS-13, 14, AND 15 MERIT PAY EMPLOYEES WILL BE CONVERTED IN OCTOBER 1981. UNTIL THAT TIME, EMPLOYEES WHO ARE IDENTIFIED FOR COVERAGE IN THE MERIT PAY SYSTEM WILL CONTINUE TO RECEIVE FULL PAY COMPARABILITY ADJUSTMENT AND BE ENTITLED TO WITHIN-GRADE INCREASES AND QUALITY INCREASES. AS PART OF THE PLANNING PROCESS			
		PAGE NO. 1	NO. OF PGS. 2
		SECURITY CLASSIFICATION	

TELEGRAPHIC MESSAGE

NAME OF AGENCY	PRECEDENCE ACTION INFO.	SECURITY CLASSIFICATION
ACCOUNTING CLASSIFICATION	DATE PREPARED	TYPE OF MESSAGE ☐ SINGLE ☐ BOOK ☐ MULTIPLE-ADDRESS
FOR INFORMATION CALL		
NAME	PHONE NUMBER	
THIS SPACE FOR USE OF COMMUNICATION UNIT		

MESSAGE TO BE TRANSMITTED (Use double spacing and all capital letters)

TO: ALFLD

HOWEVER, GS-15 MERIT PAY SYSTEM EMPLOYEES WILL BE COVERED BY A PERFORMANCE APPRAISAL SYSTEM ON A TEST BASIS ONLY. THIS TEST PERFORMANCE APPRAISAL PERIOD WILL START JANUARY 1, 1980, AND END JULY 31, 1980. GUIDELINES WILL BE DISTRIBUTED PRIOR TO JANUARY 1, 1980. TEST RESULTS WILL BE EVALUATED AND MODIFICATIONS TO THE SYSTEM MADE AS NECESSARY.

AS NOW PLANNED, THE FIRST PERFORMANCE APPRAISAL PERIOD FOR GS-13, 14, AND 15 MERIT PAY EMPLOYEES WILL BEGIN ON OCTOBER 1, 1980 AND END ON JULY 31, 1981. THESE EMPLOYEES WILL THEN BE CONVERTED TO THE MERIT PAY SYSTEM IN OCTOBER 1981, AND MERIT PAY INCREASES WILL BE AWARDED BASED ON PERFORMANCE FOR THE PERIOD ENDING JULY 31, 1981. PLEASE ADVISE ALL EMPLOYEES AS APPROPRIATE.

05A/001

OCT 25 1979

359C
GEKING:DHR CSRS (05A) 05A 05 005 001

PAGE NO.	NO. OF PGS.
2	2

SECURITY CLASSIFICATION

**MERIT
SYSTEMS
PROTECTION
BOARD**

Washington, D.C. Region
Washington, D.C. 20419

In Reply Please Refer to:

Your Reference:

Sydney Shuman
Chairman, Board of Veterans Appeals
Veterans Administration
Washington, D.C. 20420

AUG 24 1979

Re: Appeal of Sydney Shuman

Dear Mr. Shuman:

This acknowledges receipt of your petition for the subject appeal.

The case will be assigned shortly to a presiding official who will review your petition and ask the agency responsible for the contested action or decision to submit its written response to the appeal. The presiding official will send a copy of the response and any other submissions to you and your designated representative. If the appeal is within the Board's jurisdiction and acceptable for processing, the hearing you requested will be conducted approximately three to four weeks after receipt of the agency submission. If you did not request a hearing in your petition for appeal, you may amend your petition to submit such a request within ten (10) calendar days after your receipt of this letter. Unless you have requested a hearing by this time, you will have waived your right to a hearing, and the presiding official will adjudicate the case on the record after providing you and the other parties the opportunity to file written submission. A request for a hearing may be withdrawn any time before the hearing convenes.

It is the policy of the Merit Systems Protection Board to complete action on an appeal within 120 calendar days after the petition for appeal is filed. The Board expects you to cooperate in the expeditious processing of this case. Failure to prosecute the appeal expeditiously may result in its dismissal.

It is also the policy of the Board to decline any request for a continuance of a hearing or for an extension of time within which to submit evidence and argument unless the request is supported by an affidavit showing good cause for granting a continuance or extension. Extraordinary circumstances must be shown to have more than one continuance or extension allowed.

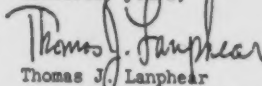
-2-

The Board requires that the parties designate their representative, if any, in writing. If you choose to have a representative and have not already done so, you must notify this office immediately in writing of the name, address, and telephone number of the person you have authorized to act in your behalf. A "Designation of Appellant's Representative" form is enclosed for your convenience. (If you are a representative and have not submitted with your petition a written designation of representative signed by the appellant, you must arrange for the appellant(s) whom you represent to file a designation within ten (10) calendar days after your receipt of this letter. Failure to file the designation(s) within this time period may result in the dismissal of the appeal.

We remind you that Section 1201.26 of the Board's regulations requires that one original and three copies of all pleadings and attachments must be filed with the field office.

The Board's appellate regulations are found in Title 5, Code of Federal Regulations, Part 1201. These are available for review in the offices of the Board, agency personnel or employee relations offices, and in some large public libraries. We urge all parties to review these regulations for detailed information on the practices and procedures followed by the Board in processing an appeal.

Sincerely yours,


Thomas J. Lanphear
Chief Appeals Officer

Enclosure: Privacy Act Statement
Designation of Representative form

MERIT SYSTEMS PROTECTION BOARD

PRIVACY ACT STATEMENT

During the course of processing the appeal which you or your representative has filed, it is necessary to collect personal information that is relevant and necessary to reaching a decision in your case. The Merit Systems Protection Board collects this information in order to process appeals under one or more of the following authorities: Title 5 U.S.C., sections 1302, 3301, 3302, 5115, 5338, 5346, 7151, 7154, 7301, 7501, 7512, 7701, and 8347, as well as Executive Orders 9830, 11222, 11478, 11491, and 11787. Since your appeal is a voluntary action, you are not required to provide any personal information to the Merit Systems Protection Board in connection with your appeal. However, failure to provide all information essential to reaching a decision in your case could result in the cancellation of your appeal.

The appeal decisions of the Merit Systems Protection Board are final administrative decisions and as such are available to the public under the provisions of the Freedom of Information Act. Some information about your appeal is used in depersonalized form as a data base for program statistics. If there is a need to disclose information from your appeal file for reasons other than these, or those cited in the Privacy Act (Title 5, United States Code, 552a(b)), your prior written consent will be solicited.

Office of Personnel Management

FPM Bulletin 540-4

Bulletin

Special Bulletin # 60

Bulletin No. 540-4

Washington, D. C. 20415

July 10, 1979

SUBJECT: Guidance on Implementing Performance Appraisal for Merit Pay

Heads of Departments and Independent Establishments

In Attachment 1, guidance on developing and implementing a performance appraisal system for merit pay employees is provided. Although much of the attached guidance is also applicable for consideration in developing other aspects of an agency's performance appraisal system, special emphasis is given to those aspects of the Civil Service Reform Act relating specifically to merit pay. Consequently, the attached materials focus on: (1) taking into account individual performance and organizational accomplishment; (2) basing merit pay determinations on a number of factors such as efficiency, productivity, quality of work or service, etc.; and (3) actions agencies should consider in establishing a performance appraisal system to support merit pay determinations.

Bulletin 430-5 is being issued concurrently with this bulletin as a cross-reference. Such a joint issuance for purposes of cross-referencing is unusual and is not meant to imply that future interrelated performance appraisal and merit pay guidance will also be issued in this manner. However, during the critical developmental phase of performance appraisal and merit pay programs, the Office of Personnel Management (OPM) believes it is important to:

- emphasize the strong link between these two programs, each of which must be designed, developed, coordinated and implemented with the other in mind.
- encourage communication and a good working relationship between the performance appraisal and merit pay programs, especially in agencies where these programs are being developed by separate task forces.
- provide agencies who are planning on early implementation (e.g., October 1979) of performance appraisal system(s) followed by merit pay determinations in October 1980 with the many interrelated preparatory actions that need to take place before actual implementation can begin.

Agency personnel involved in implementing performance appraisal and merit pay should consult the latest OPM issuances in the 430 and 540 codes.

Julie Sugarman
Julie M. Sugarman
Deputy Director

Attachment

Inquiries: Office of Leave and Pay Administration Policy, Compensation Division,
extension 48960 or 254-8960

Code: 540, Merit Pay and Cash Awards

Distribution: Limited, Heads of Departments and Agencies and Asst. Secretaries for
Administration (or equivalent)

Bulletin Expires: July 20 1980

I. Appraising Performance For Merit Pay

The successful implementation of the Merit Pay System depends heavily on the solid foundation of a well designed and working performance appraisal system upon which all merit pay determinations will be based. FPM Bulletin No. 430-1, dated December 14, 1978, provides initial guidance on implementing the performance appraisal provisions of the Civil Service Reform Act and outlines the requirements appraisal systems must meet. In addition, interim regulations for performance appraisal (Part 430 of OPM's regulations) and draft regulations for the Merit Pay System (Part 540 of OPM's regulations) were published in the Federal Register on January 16, 1979, and April 20, 1979, respectively. The following guidelines contain supplemental information and points of view that agencies need to consider when developing performance appraisal system(s) to be used for merit pay decisions for supervisors and management officials in GS-13 through GS-15 who will be covered by merit pay. Agencies must meet the requirements of the performance appraisal provisions before they can implement merit pay.

II. Performance Appraisal Provisions

The performance appraisal process should begin with a review of the position description of each covered employee to determine the accuracy and completeness of that document and the resulting position classification. It is important to spend sufficient time on actual job duties and reporting relationships to obtain a clear understanding of the requirements of these positions and how they relate to overall organizational goals and objectives. This understanding will facilitate agency compliance with the key legal requirements in performance appraisal.

Under the requirements of the law, agencies must communicate to employees the performance standards and the critical elements of their positions at the beginning of each performance appraisal period. In addition, each agency's proposed performance appraisal system must be reviewed by OPM for statutory and regulatory compliance. Details of these requirements may be found in the previously cited performance appraisal issuances.

III. Determinations to Provide for Merit Pay Increases

Section 5402(b) of the merit pay legislation has two provisions that relate specifically to the performance appraisal of merit pay employees. These are that determinations to provide for merit pay increases (1) may take into account individual performance and organizational accomplishment and (2) shall be based on a number of factors such as efficiency, productivity, quality of work or service, etc. Although OPM will publish guidance on this section from time to time, especially concerning organizational accomplishments, agencies are expected to do the developmental work of translating the requirements of the law into the actual performance appraisal system(s) that they will use. The following is OPM's initial guidance to agencies on implementation of section 5402(b).

A. Organizational accomplishment vs. individual performance

In section 5402(b)(2)(A), the law provides that determinations to provide merit pay increases may take into account individual performance and organizational accomplishment. Organizational accomplishment in this context refers to outcomes (results) over which the supervisor or management official has control or substantial influence.

Appraisal of organizational accomplishment insures that merit pay employees will be appraised on the results of their efforts. Appraisal of organizational accomplishment presupposes a thorough analysis of organizational purposes so that expectations of results in key areas may be established. Where these have been identified, and the attainment of results is properly based on the manager's accomplishments through the direction of subordinate staff, the manager's appraisal in these areas pertains to organizational performance. Based on these considerations, it may be seen that an appraisal of specific

Attachment 1 to FPM Btn. No. 540-4 (2)

mission-oriented "program management" results constitutes the primary category for identifying organizational performance factors.

In contrast to organizational performance, individual performance factors are those specific assignments, skills, management methods, and other characteristics which describe the manager's performance apart from that of the subordinate staff. They consist of those result areas for which the manager is personally responsible. They are ones which either may not be delegated or are a direct function of the individual's methods of managing. Individual performance factors will generally fall within two broad categories which may be characterized as "individual responsibilities" and "human resource management."

The "individual responsibilities" category pertains to those assignments which may not be delegated. Examples of such factors might be budget management, equal employment opportunity and affirmative action efforts, and the fair and accurate appraisal of employees.

The "human resource management" category consists of those managerial styles, skills, methods, or activities which are established as important by higher management in maintaining or improving program and/or subordinate effectiveness. Organizational results may be viewed as dependent on such factors since they pertain to the individual manager's effectiveness in producing those results. Such factors, however, consider "how" results are attained, or "whether" desired results are likely to be attained if the manager does not engage in certain activities. In this sense, such factors are intermediate measures of organizational success and reflect higher management's judgements about the likely impact on desired or expected results.

It is important to understand that attaining desired organizational, programmatic results is not always representative of satisfactory performance on individual performance factor. For example, organizational (program) success during the appraisal period could result from an exceptionally talented staff developed by a previous manager. Inattention to the development of new staff may not express itself in observable organizational outcomes in the relatively short period covered by the appraisal. This might also be true of certain styles of leadership which would produce some immediate, tangible organizational results but lead to longer range problems and organizational ineffectiveness.

These observations require that higher management clarify the specific types of managerial styles, methods, or activities which are deemed appropriate. Appraisal of individual performance should then be based upon these standards as opposed to the longer range results anticipated by failure to meet these standards.

In order to establish the basis for taking organizational accomplishment into account for merit pay determinations, it will be important to (1) formally identify agency goals and organizational objectives which may be directly linked to the responsibilities and official roles of supervisors and management officials and (2) analyze and describe the relationship between the organizational unit of the merit pay employee and the larger organization. The formal identification of goals and objectives will enhance communications, unity of purpose, and channeling of resources to accomplish organizational objectives. The analysis of organizational relationships will aid in understanding how a unit contributes to the efficiency and effectiveness of the organization as a whole, and will aid in developing measures of such contribution.

A useful resource for agencies to consider in setting organizational objectives may be the agency's budgetary program and work planning process as sources of already available information. Such resources could help establish what the targeted organizational accomplishments are and how they should be met. Useful information may be derived directly from the Zero-Based Budgeting (ZBB) process or other agency budgeting and planning documents. This information could then be used as the basis of a Management-by-Objectives (MBO) type approach if the agency chooses to use such an approach. It is critical that performance objectives of merit pay employees be a natural outgrowth, on a continuum, with the objectives set for the Senior Executive Service members. When performance objectives are

set concurrent with, or within the context of, existing agency programs, they can become an appropriate basis for the distribution of merit pay funds by the head of an agency in recognition of organizational accomplishment.

If an agency chooses to use an MBO-type system, it is important to emphasize that to be effective, it must be flexible enough to accommodate any changes in priorities which may occur during the appraisal period. These may result from reorganization, a shift in program emphasis by top management, or the passage of a new piece of legislation which may impose new requirements upon an agency. The documentation can be a simple sheet of paper which lists the program objectives, including any dates by which it is expected certain actions will be taken. As objectives are identified, performance standards which measure the work results in terms of quality, quantity, timeliness, etc. should also be established. Furthermore, it would be desirable to establish priorities and assign weights to each of the objectives. (NOTE: Since ZBB requires the forced ranking of objectives, it could serve as a basis for determining the relative priority of any established objectives for merit pay employees.) Even though weighting objectives is a subjective process, it does serve to indicate the relative importance of the objectives to the organization and communicate to the employee that not all of the objectives are of equal importance or difficulty. Opposite each objective a narrative of the results achieved should be recorded. Whatever method is used to document objectives and results, the agency needs to be sure that appraisal information will permit comparisons among employees if the agency is using such comparisons to make merit pay determinations.

MBO has been cited as one method to assess organizational accomplishments. Techniques for assessing individual accomplishments may be used in conjunction with MBO. For example, a Work Planning and Progress Review system may be used in conjunction with organizational standards for assessing organizational accomplishments. As already mentioned, ZBB may be used in conjunction with MBO to link the budgetary process to goals and objectives of organizational units to insure their relevance and consistency with the larger organization.

B. Factors for merit pay performance appraisal

In section 5402(b)(2)(B), the law prescribes that merit pay determinations shall be based on factors such as: (i) any improvement in efficiency, productivity, and quality of work or service, including any significant reduction in paperwork; (ii) cost efficiency; (iii) timeliness of performance; and (iv) other indications of the effectiveness, productivity and quality of performance of the employees for whom the employee is responsible. All of these factors relate to performance standards in that they may be expressed as measures of levels of achievement of the employees' duties and responsibilities. Agencies should incorporate these and other related factors that they may develop into the performance standards of merit pay employees.

IV. OPM Recommendations on Merit Pay Implementation - Preparatory Actions

- A. Compile and analyze a sample of positions identified for coverage under the Merit Pay System to identify critical and non-critical job elements and develop written performance standards for all elements (using the factors described in section 5402(b), as appropriate) on which performance will be appraised for any purpose. Direct employee participation in this process is highly recommended. Consider alternate performance appraisal methods which meet the requirements of the law.

This exercise should give an indication of the amount of work involved in establishing performance standards and identifying critical job elements and, therefore, assist in estimating the resources needed to develop and implement a performance appraisal system in time to begin an appraisal period for merit pay prior to October 1979, if an agency wishes to do so. While OPM encourages agencies to move expeditiously, if the state of the agency's current appraisal program or the available resources are such that to attempt to begin that quickly could seriously jeopardize the quality of the program, then it would be better to wait until needed start-up work can be done before beginning implementation.

Attachment 1 to FPM Stn. No. 540-4 (4)

- B. Develop the format and procedures for writing performance standards and communicate these standards to employees. OPM strongly urges that all performance standards to be used for merit pay determinations be written and a copy given to the employee in advance of the appraisal period.
 - C. Consider ways to insure consistency of performance standards among employees at the same grade levels of work, to the extent that is feasible and appropriate. Because objectives must be integrated into the total management process in order to be meaningful and must be consistent with overall organizational objectives, there must be a procedure for insuring that they are reviewed for this purpose. Therefore, agencies are encouraged to provide for a review of proposed performance standards at least one management level above the originating level within an organization. It may also be appropriate to provide a copy for feedback to a monitoring agent (such as the personnel office) as well.
 - D. Determine the agency's policies for the performance appraisal process and the resources and mechanisms needed to operate the program efficiently. Some policy areas which must be addressed include: a) the length of the appraisal period; b) interim reviews of individual performance; c) interim reviews of organizational accomplishments; d) intra-agency monitoring and reporting techniques; e) final performance appraisal; f) intra-agency level(s) of review; g) communication to the employees; h) follow-up actions; etc.
 - E. OPM will require annual merit pay determinations based upon the use of a current performance appraisal. There should be a reasonably short period of time between the final performance appraisal and the actual merit pay determination and its distribution to the employee. This will serve to reinforce the pay-for-performance concept because the employee will see a direct and timely link.
 - F. Note that even though some existing agency performance appraisal systems may already meet many or all of the minimal requirements of the Civil Service Reform Act, these systems may not be used retroactively for the purpose of awarding merit pay. Instead, a new performance appraisal period should be established to begin after the formal OPM review of the proposed performance appraisal system. Although OPM generally recommends a 12-month period for the merit pay performance period, it should be noted that in some circumstances a relatively short appraisal period (e.g., 3 months) may provide enough time to form the basis for merit pay determinations. The decision to use a shorter appraisal period would be appropriate for agencies who wish to adjust pay under the Merit Pay System by a given date (e.g., October 1979) but who have not had a performance appraisal system in place for at least 12 months, or for new employees entering the Merit Pay System in an established agency program at varying times throughout the year. In both cases, a high degree of familiarization, confidence, and expertise with the performance appraisal system must be present within the agency.
- It is important that employees covered by the system know from the outset of the appraisal period what the "ground rules" are. Sound personnel management dictates that a system change as major as merit pay not be thrust upon employees or superiors. Rather, all aspects of the program should be clearly communicated to the employees prior to the effective date of the change. Agencies must first submit their performance appraisal system(s) to OPM for review. If the system(s) meets the legal and regulatory requirements, agencies will then be in a position to communicate the critical elements and performance standards to merit pay employees with the understanding that an appraisal of performance according to these standards will be the basis for awarding merit pay at a later date.
- G. Consider a test-run of the performance appraisal system and a simulation of merit pay distribution before actual implementation. This would give covered employees the opportunity for a sample, first hand look at the expectations and workings of the new system, and a simulation of merit pay distribution would give evaluators a chance to develop expertise and confidence in performance appraisal and merit pay distribution

and would give the opportunity to identify system problems before decisions are made which affect employees' pay. Another important result of a test-run would be the development of realistic expectations of the system.

H. Determine the need, content, strategy, and timetable for training. Within the broad context of the use of performance appraisal as a basic management tool, the training should be designed to:

1. ensure that the merit pay employees, as well as their superiors, fully understand the impact of the Reform Act changes on what they do and how they do their work;
2. provide basic facts and definitions of the various terms, policies, and principles stated and implied in the Reform Act;
3. interrelate the separate sections of the Reform Act and join them in such a way as to form a systems concept; and
4. obtain support and commitment of key organizational managers for the development and implementation of the Reform Act features in the agencies.
5. explain the agency appraisal and merit pay programs, identify the roles of subordinates and supervisors, and provide the opportunity to answer employee questions about the agency programs.

United States Civil Service Commission

CSC Bulletin 430- 1

Bulletin

Special Bulletin #9

Bulletin No 430- 1

Washington, D. C. 20415
December 14, 1978**SUBJECT:** Performance Appraisal
Provisions of the CSRA**Heads of Departments and Independent Establishments:**

One of the major parts of the Civil Service Reform Act is a complete revision of the performance appraisal provisions contained in Chapter 43 of title 5, U. S. Code on which Part 430 of the Commission's regulations and FPM Chapter 430 are based. This bulletin discusses these changes and the actions necessary to implement them.

Purposes of Reform in Performance Appraisal

The major purpose of the changes in new Subchapter I of Chapter 43 of title 5 is to provide a statutory framework which will permit the performance appraisal process to become more meaningful and useful to supervisors and subordinates by providing:

1. performance appraisal systems tailored to an agency's individual needs;
2. job-related performance appraisals;
3. information to make better quality personnel decisions;
and
4. better utilization of an agency's human resources.

Principal Provisions

Attachment 1 to this bulletin is a copy of provisions of the new Subchapter I of Chapter 43. The principal statutory provisions are:

1. Existing Chapter 43 is repealed, including the requirements for assignment of summary adjective ratings of Outstanding, Satisfactory, and Unsatisfactory and the procedures for appealing ratings.
2. New Subchapter I applies generally to all employees in the competitive and excepted service. It does not apply to employees in the Senior Executive Service. (See attachments 1 and 3 for specific changes in employee and agency coverage.) Performance of members of the Senior Executive Service is governed by new Subchapter II of Chapter 43.
3. An agency is required to establish performance appraisal systems. An agency may have several systems to meet the varying needs of organizational units within the agency.

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4. The performance appraisal systems must provide objective performance standards based on the job in question, must identify the critical elements of each job, and may include standards of courtesy to be shown the public.
5. The performance standards and critical elements must be communicated to employees at the beginning of each appraisal period.
6. Agencies must appraise employees' performance periodically, based on the pre-established performance standards and critical elements of the job.
7. The results of performance appraisals must be used as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining in reduction in force, and removing employees.
8. Agency managers have a positive responsibility to assist employees to improve unacceptable performance, and to take action when performance fails to improve, through separation, demotion, or reassignment.
9. Unacceptable performance, defined as failure to meet established performance standards in one or more critical elements of an employee's position, is cause for removal or demotion.
10. Removals or demotions for unacceptable performance will be taken under a new procedure and are appealable to the Merit Systems Protection Board or, if a bargaining agreement exists, grievable through negotiated grievance procedures.

Major Implications of Changes

The major implications of these changes pertain to the requirements for establishing performance standards and critical elements based on the job, communicating these standards and critical elements to employees, and appraising employees based on the pre-established standards, and to a positive obligation for managers to identify performance problems and take appropriate corrective actions. In so many words, managers and supervisors must ask themselves "Exactly what is this employee being paid to do, how well (much, fast) do I expect the work to be accomplished and is the employee performing the work in an acceptable manner?" The changes specifically encourage employee participation in establishing performance standards because research has shown that employees who do so are more committed to reaching those standards than employees who have no role in setting standards.

Although agencies may continue to cover employees in a wide range of occupations (such as mid-level managers at GS 13-15) under a single performance appraisal system, within each system, performance standards and critical elements will have utility only if they are tailored to the job in question. Agencies will want to carry out job analysis of some type to assure that employees are being appraised on job-related factors and that the critical elements of their jobs have been identified.

The legislation leaves to agency discretion decisions on the type or types of performance appraisal systems agencies use--i.e., traditional, management by objectives, work planning and progress reviews, and the method or methods utilized to establish performance standards.

Agencies should select the methods of appraising performance which best suit their own needs. Special needs in appraising certain categories of employees, such as managers, whose organizational performance hinges in part on the performance of others, may lead to decisions to use different methods for different groups. For example, the linkage between organizational and individual performance provided by MBO systems makes this method particularly well-suited to managerial performance appraisal and for providing the information necessary to make merit pay decisions.

Questions about the New Provisions

Attachment 2 is a comparison of existing and new provisions. Attachment 3 contains a detailed series of questions and answers about the provisions of Subchapter 1 of Chapter 43. The questions and answers are grouped in the following broad categories:

- 1) employee and agency coverage;
- 2) the performance appraisal process;
- 3) implementation of the new provisions and interim procedures pending full implementation; and
- 4) the role and responsibilities of the Civil Service Commission and, effective January 1, 1979, of the Office of Personnel Management.

The range of the points covered by these questions reflect most of the topics which will eventually be contained in a revised FPM Chapter 430. A number of questions address areas in which agencies are responsible for determining the way in which they will meet the statutory requirements. These questions are included to emphasize the broad areas in which agencies have discretion to tailor systems to meet their needs and to point out options for consideration. We urge that agencies redelegate, as appropriate, these authorities within the agency. Other questions address points for which, as yet, there are no answers. They are included, however, to communicate the fact that there are no answers at this time and that we will be seeking agencies' views on these questions. Information on applying the new procedure for demoting or removing an employee based on performance will be provided separately.

Implementation

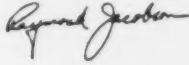
The provisions of Subchapter 1 of Chapter 43 are effective on January 11, 1979. However, agencies have until October 1, 1981 to complete the task of identifying critical elements, establishing performance standards, and communicating these to employees.

As in other areas requiring development of new regulations and FPM instructions, we plan to issue draft regulations and, if possible FPM chapter changes, for formal comment before December 31, 1978. These will go into effect on an interim basis on January 11, 1979. Following the comment period and consideration of the comments

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received, final regulations and FPM chapter revisions will be issued. Both the interim and final regulations will provide for temporarily continuing present provisions until agencies can implement the changes. However, we strongly urge agencies not to wait for issuance of final regulations and FPM material to begin taking necessary steps to implement these provisions, particularly those related to improving the quality of the performance appraisal process.

Attachments



Raymond Jacobson
Executive Director

PERFORMANCE APPRAISAL

Sec. 907. (a) Chapter 43 of title 5, United States Code, is amended to read as follows:

*CHAPTER 43—PERFORMANCE APPRAISAL

*SUBCHAPTER 1—GENERAL PROVISIONS

*Sec.

- *4301 Definitions.
- *4302 Establishment of performance appraisal systems.
- *4303 Actions based on unacceptable performance.
- *4304 Responsibilities of Office of Personnel Management.
- *4305 Regulations.

*§ 4301. Definitions

"For the purpose of this subchapter—

"(1) 'agency' means—

"(A) an Executive agency;

"(B) the Administrative Office of the United States Court;

and

"(C) the Government Printing Office;

but does not include—

"(i) a Government corporation;

"(ii) the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, or any Executive agency or unit thereof which is designated by the President and the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or

"(iii) the General Accounting Office;

"(2) 'employee' means an individual employed in or under an agency, but does not include—

"(A) an employee outside the United States who is paid in accordance with local native prevailing wage rates for the area in which employed;

"(B) an individual in the Foreign Service of the United States;

"(C) a physician, dentist, nurse, or other employee in the Department of Medicine and Surgery, Veterans' Administration whose pay is fixed under chapter 75 of title 38;

"(D) an administrative law judge appointed under section 3105 of this title;

"(E) an individual in the Senior Executive Service;

"(F) an individual appointed by the President; or

"(G) an individual occupying a position not in the competitive service excluded from coverage of this subchapter by regulations of the Office of Personnel Management; and

"(3) 'unacceptable performance' means performance of an employee which fails to meet established performance standards in one or more critical elements of such employee's position.

*§ 4302. Establishment of performance appraisal systems

"(a) Each agency shall develop one or more performance appraisal systems which—

"(1) provide for periodic appraisals of job performance of employees;

"(2) encourage employee participation in establishing performance standards; and

"(3) use the results of performance appraisals as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees.

"(b) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for—

"(1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria (which may include the extent of results demonstrated to the public) related to the job in question for each employee or position under the system;

"(2) as soon as practicable, but not later than October 1, 1951, with respect to initial appraisal periods, and thereafter at the beginning of each following appraisal period, communicating to each employee the performance standards and the critical elements of the employee's position;

"(3) evaluating each employee during the appraisal period on such standards;

"(4) recognizing and rewarding employees whose performance is satisfactory;

"(5) assisting employees in improving unacceptable performance; and

"(6) reassigning, reducing in grade, or removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance.

"§ 1902. Actions based on unacceptable performance

"(a) Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance.

"(b)(1) An employee whose reduction in grade or removal is proposed under this section is entitled to—

"(A) 30 days' advance written notice of the proposed action which identifies—

"(i) specific instances of unacceptable performance by the employee on which the proposed action is based; and

"(ii) the critical elements of the employee's position involved in each instance of unacceptable performance;

"(B) be represented by an attorney or other representative;

"(C) a reasonable time to answer orally and in writing; and

"(D) a written decision which—

"(i) in the case of a reduction in grade or removal under this section, specifies the instances of unacceptable performance by the employee on which the reduction in grade or removal is based; and

"(ii) unless proposed by the head of the agency, has been concurred in by an employee who is in a higher position than the employee who proposed the action.

"(2) An agency may, under regulations prescribed by the head of such agency, extend the notice period under subsection (b)(1)(A) of this section for not more than 30 days. An agency may extend the notice period for more than 30 days only in accordance with regulations issued by the Office of Personnel Management.

"(c) The decision to retain, reduce in grade or remove an employee—

"(1) shall be made within 30 days after the date of expiration of the notice period; and

"(2) in the case of a reduction in grade or removal, may be based only on those instances of unacceptable performance by the employee—

"(A) which occurred during the 1-year period ending on the date of the notice under subsection (b)(1)(A) of this section in connection with the decision; and

"(B) for which the notice and other requirements of this section are complied with.

"(d) If, because of performance improvement by the employee during the notice period, the employee is not reduced in grade or removed and the employee's performance continues to be acceptable for 1 year from the date of the advance written notice provided under subsection (b)(1)(A) of this section, any entry in other notation of the unacceptable performance for which the action was proposed under this section shall be removed from any agency record relating to the employee.

5 USC 4303

Removal or reduction in grade

Notice

Representation

Written decision

Extension of notice

"(e) Any employee who is a preference eligible or is in the competitive service and who has been reduced in grade or removed under this section is entitled to appeal the action to the Merit Systems Protection Board under section 7701 of this title.

"(f) This section does not apply to—

"(1) the reduction to the grade previously held of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title,

"(2) the reduction in grade or removal of an employee in the competitive service who is serving a probationary or trial period under an initial appointment or who has not completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less, or

"(3) the reduction in grade or removal of an employee in the excepted service who has not completed 1 year of current continuous employment in the same or similar position.

"§ 4304. Responsibilities of the Office of Personnel Management

"(a) The Office of Personnel Management shall make technical assistance available to agencies in the development of performance appraisal systems.

"(b)(1) The Office shall review each performance appraisal system developed by any agency under this section and determine whether the performance appraisal system meets the requirements of this subchapter.

"(2) The Comptroller General shall from time to time review on a selected basis performance appraisal systems established under this subchapter to determine the extent to which any such system meets the requirements of this subchapter and shall periodically report its findings to the Office and to the Congress.

"(3) If the Office determines that a system does not meet the requirements of this subchapter (including regulations prescribed under section 4305), the Office shall direct the agency to implement an appropriate system or to correct operations under the system, and any such agency shall take any action so required.

"§ 4305. Regulations

"The Office of Personnel Management may prescribe regulations to carry out the purpose of this subchapter."

(b) The item relating to chapter 43 in the chapter analysis for part 111 of title 5, United States Code, is amended by striking out "Performance Rating" and inserting in lieu thereof "Performance Appraisal".

Comparison of Provisions under Existing Chapter 43 and New Subchapter I of Chapter 43 of Title 5, U.S. Code

Item	Provision Under Existing Chapter 43	Provision Under New Subchapter I of Chapter 43
1. <u>Employee and Agency Coverage</u>	1. With specific exceptions, applies generally to all Executive Branch employees.	1. With specific exceptions, applies generally to all Executive Branch employees except members of the Senior Executive Service. SES members are covered by separate requirements. Other major new exceptions are: 1) all government corporations; 2) additional agencies or units of agencies whose principal function is the conduct of foreign intelligence or counterintelligence; and 3) the General Accounting Office. In addition, the Office of Personnel Management may exclude positions in the excepted service.
2. <u>Performance Rating Plans</u>	2. Requires agencies to establish performance rating plans.	2. Requires agencies to develop and use one or more performance appraisal systems.
3. <u>Summary Adjective Ratings</u>	3. Requires agencies to assign summary adjective ratings of Outstanding, Satisfactory, and Unsatisfactory (with optional fourth category) to all covered employees.	3. Requirement for assignment of ratings is repealed. Agencies required to appraise employees' job performance.
4. <u>Basis for Evaluation Job</u>	4. Performance requirements in effect during the rating period and communicated to employees at the beginning of the rating period.	4. Objective performance standards based on the job in question which are communicated to the employee at the beginning of the appraisal period.

- | | | |
|--|---|--|
| 5. <u>Frequency of Rating</u> | 5. At least annually. (CSC regulation) | 5. Requires periodic appraisals. |
| 6. <u>Uses</u> | 6. Rating used to grant extra credit in RIF and as basis of step increases for wage system employees. | 6. Appraisals are a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees. |
| 7. <u>Review of Ratings</u> | 7. Appealable through impartial review and/or Board of review. | 7. Abolished. |
| 8. <u>Removal or Demotion Based on Performance</u> | 8. Under adverse action procedures, must be "for such cause as promotes the efficiency of the service." Appeal to CSC decided based on "preponderance of the evidence" criterion. | 8. Under new simplified procedure for failure to meet performance standards in one or more critical elements of the position. Appeal to Merit Systems Protection Board or grievance under negotiated procedure decided based on lesser "substantial evidence" criterion. |
| 9. <u>Assistance to Agencies</u> | 9. No requirement. | 9. Office of Personnel Management required to provide technical assistance to agencies in the development of appraisal systems. |

General Performance Appraisal Provisions of the Civil Service Reform ActQuestions and Answers

The following questions and answers cover in detail the provisions of Subchapter 1 of Chapter 43 of the Civil Service Reform Act and should provide the information needed by agencies to begin implementing the performance appraisal provisions. Some questions deliberately repeat information contained in the covering bulletin so that this attachment may be used separately. As is noted in the responses to various questions, we will be consulting with agencies on a number of specific points before issuing final guidance.

1. Employer and Agency Coverage

Q 1. What groups of positions or agencies formerly excluded from coverage of performance rating provisions are now covered by Subchapter 1 of Chapter 43?

- A 1. - The Nuclear Regulatory Commission;
- Civilian officers or members of crews of vessels operated by the Department of the Army or the Department of the Navy; and
- Department of Defense teachers and other school personnel employed in the U.S. under section 6(c) of Public Law 81-874 (20 U.S.C. 241(a)).

Q 2. What groups of positions or agencies formerly covered by performance rating provisions are now excluded from the coverage of Subchapter 1 of Chapter 43?

- A 2. - Executives who are in the Senior Executive Service will be covered by separate performance appraisal provisions based on the requirements of new Subchapter II of Chapter 43.
- The Library of Congress;
- The Botanic Garden;
- The Government of the District of Columbia;
- The General Accounting Office;
- The Defense Intelligence Agency; and

- An individual appointed by the President.

In addition to these specific exclusions;

- The President may exclude any agency or unit of an agency which is primarily engaged in the conduct of foreign intelligence or counterintelligence activities; and

- The OPM may exclude positions in the excepted service.

Q 3. What criteria will OPM apply in exercising its authority to exclude positions in the excepted service?

A 3. No general criteria have been developed.

Q 4. Will OPM develop general criteria for excluding positions or make decisions on a case-by-case basis?

A 4. This is a question on which we will consult with agencies.

Q 5. Are executives who do not elect to enter the SES covered by performance appraisal provisions in Subchapter I or by Subchapter II?

A 5. Subchapter I.

Q 6. What responsibility do agencies excluded from the coverage of this subchapter have for appraising an employee's performance and considering that performance in making personnel decisions?

A 6. The merit system principles (contained in new section 2301 of title 5, U.S. Code) which apply to all Executive agencies, the Administrative Office of the United States Courts, and the Government Printing Office, place a general responsibility on agencies excluded from the coverage of this subchapter to appraise employee performance and consider it in making personnel decisions. In addition, several agencies excepted from Subchapter I of Chapter 43 are covered by merit pay provisions which require using performance appraisals in making merit pay determinations.

Q 7. Are temporary and probationary employees covered by these provisions?

A 7. Yes, unless excluded by statute or OPM authority. The probationary or trial period is the time during which agencies will want to review an employee's performance most thoroughly to determine whether he or she in fact can do the job for which hired. Since

many temporary employees return to work for Federal agencies, it is important that there be a record of previous performance when they serve long enough to permit an accurate appraisal so that this performance can be given appropriate consideration in making a new appointment. (Probationary and temporary employees are not, however, covered by the procedures for demotions and removals based on performance.)

II. The Performance Appraisal Process

PERFORMANCE APPRAISAL SYSTEMS

Q 8. What kinds of performance appraisal systems meet the criteria established in statute?

A 8. The statute requires that agencies base systems on the job to be performed. It deliberately leaves the manner in which agencies do this up to the agency because factors such as the type of work performed, organizational structure, and the organizational climate all affect the type of system which will work best in an agency or component of an agency. Agencies are strongly encouraged to keep systems as simple as possible, and concentrate on the basic elements--clear standards and meaningful, continuous communications between supervisors and subordinates about performance.

Many agencies will want to carry out some form of job analysis to assure that employees are being appraised on job-related factors and that the critical elements of their jobs have been correctly identified. Again, there are several ways in which job analysis may be carried out ranging from analysis done by the supervisor to techniques requiring special skills.

Once the factors have been established and critical elements identified, standards of performance need to be established so that both the supervisor and subordinate know how well (how fast, how much) the employee must perform in order to be performing acceptably.

Agency-wide rating systems based on general characteristics such as courtesy, adaptability, etc., or systems based on broad rating categories such as undefined concepts of quality, quantity or timeliness will not provide the information agencies need because they contain no performance standard and may not even be relevant to the job. For example, timeliness means nothing to supervisor or subordinate unless it is put into context of the job being performed.

However, a standard for timeliness that all correspondence received must be responded to within five work days is clear to both and it can easily be determined whether the employee met the standard.

- Q 9. Will OPM prescribe the type or types of systems which may be used?
- A 9. No. OPM will establish criteria that systems must meet. However, the decision on what type or types of appraisal systems to use--i.e., traditional, work planning and progress reviews, or management by objectives, is within an agency's discretion.
- Q 10. What should an agency consider in deciding how many appraisal systems to have?
- A 10. The basic performance-related consideration is whether there are genuine differences in the work force, types of work performed, etc., which can best be accommodated through substantially different methods and procedures of appraising performance.

Among other factors which may influence agency decisions are:

- 1) the authority normally delegated to major components and subcomponents to establish their own personnel policies;
- 2) the levels of exclusive recognition; and
- 3) interest in trying out different methods and procedures for appraising performance.

Agencies are strongly encouraged to redelegate the responsibility for the performance appraisal process and to try out different methods and procedures of establishing performance standards, identifying critical elements, and appraising performance.

PERFORMANCE STANDARDS

- Q 11. Should performance standards be developed and critical elements identified centrally in an agency?
- A 11. This is within the discretion of the agency in developing systems tailored to its needs. Among the factors which may influence this decision are:

- 1) the number of occupational categories common across agency subcomponents, the number of employees in these categories, and the degree to which these employees are in fact performing the same duties and responsibilities;
- 2) the degree to which responsibility for performance appraisal is to be decentralized; and
- 3) availability of staff resources.

One option agencies may wish to consider is use of minimum standards which can be supplemented as needed by local units.

Q 12. If performance standards and identification of critical elements are established by individual organizational units or supervisors, how can you avoid wide differences in what is expected of employees who perform identical jobs?

A 12. Some variations in standards, even within agencies, are normal because of differing missions, slight differences in the character of the work (such as differences in equipment used) organizational climate, etc. However, any standard needs to be consistent with grade level of the position and reflect duties and responsibilities contained in the position description. Actions such as providing uniform training to all individuals responsible for establishing standards and identifying critical elements and oversight review at some level to assure that employees are treated equitably can also reduce differences.

Q 13. Should performance standards be written?

A 13. This is within the discretion of the agency in devising its system(s). The advantages of written standards are that they clarify exactly what is expected of an employee and if signed and dated by employee and supervisor, provide documentation that standards were developed, what they were, and that they were communicated to the employee.

Agencies which have written standards will want to assure that they are stated as precisely as possible so that they are clear to both supervisor and subordinate and it can easily be determined whether or not the standard was met, that all major functions or duties are covered, and that there is provision for updating them to reflect significant changes in the job during an appraisal period. We urge that written standards be kept as simple as possible.

Q 14. Can standards be developed and recorded at the supervisor - subordinate level?

A 14. Yes. We urge agencies to do this where it is appropriate.

Q 15. What role should employees have in establishing performance standards?

A 15. The Reform Act requires that agency systems encourage employee participation in standard-setting but prescribes no specific methods for doing so. Rather, it recognizes that this may be done in a variety of appropriate ways, several of which are described in Appendix A of FPM Chapter 430. While employee participation can contribute to reasonable and practical performance expectations and motivate employees to accomplish performance objectives, the ultimate responsibility for establishing performance standards lies with management.

Q 16. What is a performance standard?

A 16. A performance standard is the statement of the quality, quantity, etc., required of the performance of a component of an employee's job. A performance standard usually describes the job without regard to who is performing it. For example, a fully-trained processing clerk might be expected to complete all claims within 10 work days of receipt, average 30 claims per week over the appraisal period, have an error rate of no more than 5% and carry out his or her work with no additional guidance. Employees should have standards for every aspect of their jobs, whether or not they are critical elements.

For many jobs, however, standards can best be stated in terms of accomplishment of specific objectives or assignment. A well-prepared performance objective contains the standard to determine whether or not the objective was met. More explicit guidance will be provided on this point.

Q 17. What constitutes a "critical element of the job?"

A 17. A critical element is any requirement of the job which is sufficiently important that inadequate performance of it outweighs acceptable or better performance in other aspects of the job.

Q 18. What if an employee believes that a standard of performance is too high?

A 18. The law provides no procedure for appeal of performance standards. Employees who are members of bargaining units covered by negotiated grievance procedures covering such a complaint may grieve a standard to obtain a determination as to whether it is fair and equitable and consistent with the classification standard for the job. Under present regulations, employees not covered by a negotiated procedure may grieve the standard under the agency grievance system. However, we will be consulting with agencies to determine whether this is the most appropriate method of reviewing such complaints.

THE APPRAISAL PROCESS

Q 19. Must performance appraisals be in writing?

A 19. Although the law does not specifically require that appraisals be in writing, it does require that information from appraisals be used in making various personnel decisions. Consequently, agencies will need to have written appraisals to document the appraisal given and provide the information for personnel decisions.

Q 20. Will OPM require annual performance appraisals?

A 20. The Act requires that employees' performance be appraised periodically. OPM probably will not continue the one-year maximum appraisal period requirement. Instead, it could well require that appraisal periods be established in accordance with the work performed and the frequency with which it should reasonably be reviewed to formally assess employee performance. Agencies will be consulted on this question. Additional factors which may affect agency decisions about appraisal periods are that merit pay determinations must be made annually and that reasons more than one year old cannot be used in removing or demoting employees under the new procedure for taking actions based on performance.

Q 21. Will OPM continue the current requirement that appraisals not be made until an employee has been in the position ninety days?

A 21. The amount of time an individual needs to be in a job (or that a supervisor needs to observe an employee's performance) in order to make an informed decision about the employee's performance varies considerably from work situation to work situation. Continuation of a requirement like the one now in effect will be discussed with agencies.

Q 22. May an agency continue to use some type of summary ratings?

A 22. Yes. Appraisals may be summarized into categories at an agency's option.

Q 23. What obligation does a supervisor have to help an employee improve unacceptable performance before initiating a removal or demotion?

A 23. No single answer is possible since what is reasonable depends on the circumstances of each case. Appropriate actions may include things such as formal or on-the-job training, special assignments, and counselling.

Q 24. Does the requirement that performance appraisals be used as a factor in various personnel decisions require a separate appraisal for each purpose?

A 24. No, although agencies probably will want to use different measures for some purposes.

Q 25. Will OPM require a warning before a supervisor can give an appraisal which indicates unacceptable performance?

A 25. Probably not, but good management practice indicates that this should be done.

Q 26. May agencies require a forced distribution of appraisals?

A 26. This would be contrary to the intent of the Act that performance be fairly appraised in relation to the requirements of the job. However, agencies may want to rank order the appraisals for different purposes such as making merit pay determinations and ranking candidates for promotion.

Q 27. Are the Uniform Guidelines applicable to performance appraisals?

A 27. Performance appraisals which are based on job-related performance standards as required by this subchapter of the law should generally meet the objectives of the Uniform Guidelines. When they are used as input to employment decisions, (e.g. decisions to promote, reassign, train), performance appraisals are considered to be selection procedures and are subject to Uniform Guideline requirements. The agency may need to demonstrate that:

- 1) the information from a performance appraisal is relevant to the job for which the decision is being made; and
- 2) that the appraisal information itself is based on requirements of the employee's current job.

Q 28. Are performance appraisals grievable?

A 28. Employees who are members of bargaining units covered by negotiated procedures which include complaints about appraisals may grieve the appraisal given. Under present regulations, employees not covered by a negotiated procedure may grieve appraisals under the agency grievance system. However, we will be consulting with agencies to determine whether the existing agency grievance procedure is the most appropriate method of reviewing such complaints.

Q 29. Must agencies submit performance appraisal system plans to OPM for prior review?

A 29. Yes. Although the wording of the statute does not clearly specify that prior review is required, the legislative history is clear that the intent of the language is to provide for prior review. OPM review will be to determine whether a proposed system complies with statutory and regulatory requirements. It will, however, look primarily at an agency's headquarters policies and depend to a great extent on agency headquarters review of systems developed by individual organizational units.

USE OF APPRAISAL INFORMATION IN PERSONNEL DECISIONS

Q 30. How will performance appraisals be used in making personnel decisions on pay, awards, promotions, training, etc.?

A 30. The thrust of the law is that agencies will have to build provisions to consider performance in various decision-making processes to the extent that past performance in one's current position is relevant. Specific points are addressed below.

Q 31. How will performance appraisals be used in within-grade increase decisions for General Schedule employees? Will OPM require that an appraisal of performance have been made within, for example, ninety days of an acceptable level of competence decision? Will OPM require that performance be fully acceptable in all critical elements?

A 31. The performance appraisal changes themselves do not affect the current procedures for granting or withholding within-grade increases. However, OPM plans to consider possible changes in this area in the future. There will be consultation on any changes.

Q 32. What about performance while on detail?

A 32. This is a question on which we will be seeking agencies' views.

Q 33. How will performance appraisals be used in granting step increases to wage grade employees?

- A 33. Performance appraisals under this subchapter of the law will be the basis for granting step increases to wage grade employees.
- Q 34. How will performance appraisals be used in making merit pay decisions?
- A 34. Several options are possible. They give a variety of alternatives to agencies in areas such as the timing of appraisals and merit pay determinations, the weight to be given to the performance appraisal in making merit pay decisions, and how merit pay funds should be distributed. Agencies will be consulted on proposals. (It should be noted that the merit pay provisions provide for consideration of both individual and organizational performance.)
- Q 35. What about appraisals for promotion purposes?
- A 35. This subchapter of the law applies to appraisals on only those elements which are common to both the job currently held and the job for which the employee is being considered. It does not apply to estimates of potential to perform elements not in the current job.
- Q 36. How will employees covered by the new retained grade provisions be appraised?
- A 36. Agencies will want to appraise them on the basis of performance in the position in which they are actually working.
- Q 37. What will be used in lieu of Outstanding ratings to give extra credit for performance for RIF purposes?
- A 37. Several alternatives are being considered. Agencies and unions will be consulted on proposals.
- Q 38. Should an agency remove from the position an employee with an appraisal indicating unacceptable performance?
- A 38. When an employee's performance becomes unacceptable (whether or not a formal appraisal has been given) good personnel practice suggests that this determination should trigger prompt action to bring the employee's performance up to an acceptable level or to begin steps leading to the placement of the employee in a job he or she can perform. An agency has no justification however, for continuing to retain an employee whose performance is unacceptable in a position after attempts to improve the employee's performance or

place him or her in another position fail. (Note: except for special situations like unacceptable performance of supervisory duties during the new probationary period for new supervisors or managers, an agency has no obligation to place an employee in another position.)

III. Implementation and Interim Provisions

Q 39. When do the new provisions go into effect?

A 39. The general provisions go into effect on January 11, 1979. Agencies must meet the requirement for establishment of performance standards, identification of critical elements, and communication of these to employees by October 1, 1981.

However, agencies need to be aware of the need to coordinate implementation of performance appraisal changes with other programs. For example, merit pay phase-in may begin as early as October 1979.

Q 40. When will revised regulations and FPM instructions be available?

A 40. As stated in the cover bulletin, we plan to submit proposed regulations and, if possible, FPM chapter material for comment to all appropriate parties by December 31, 1978. These will go into effect on an interim basis on January 11. After the comment period and time for OPM to consider the comments, final regulations and FPM chapter changes will be issued. Both the interim and final regulations will provide for temporarily continuing existing agency performance rating systems until revised agency systems are approved by OPM and implemented by agencies. In other words, current performance ratings procedures continue until new systems are developed, and implemented by the agency.

Q 41. The October 1, 1981 date in statute refers only to establishing performance standards, identifying critical elements, and communicating these to employees. When will agencies be required to meet other requirements?

A 41. Agencies will be expected to have approved systems implementing all the changes, including establishment of standards, identification of critical elements, and communication of these to employees, in effect by October 1, 1981. However, initial appraisals based on the standards and critical elements can occur after October 1, 1981.

Q 42. Will ratings assigned on or after January 11, 1979 continue to be appealable through the impartial review process and/or to a Board of Review?

A 42. No. Any ratings assigned on or after January 11, 1979 will be grievable unless some other agency review procedure is established.

Q 43. What procedure will cover pending appeals or appeals of any ratings assigned before January 11, 1979?

A 43. Current procedures will apply. The Commission will continue to accept appeals to Boards of Review through December 31, 1978. However, effective January 1, 1979 all pending appeals to Boards of Review will be transferred to the Merit Systems Protection Board as part of Reorganization Plan No. 2. The MSPB will accept appeals of ratings assigned before January 10, 1979 and will designate the chairmen of boards of review for all appeals transferred to it and new appeals of ratings assigned before January 11, 1979.

Q 44. How will agencies demote or remove employees who have not been informed of the standard of performance and critical elements of their positions as required by new section 4302?

A 44. Our thinking at this point is that any employee whose performance is unacceptable but who has not been informed of these requirements must be informed of these requirements and given at least 30 days warning period to improve performance before he or she can be given a notice of proposed removal or reduction in grade under the new procedure for removing or demoting employees because of unacceptable performance.

Q 45. After January 11, 1979, how will employees be given credit for performance in reduction in force and wage grade employees be granted step increases?

A 45. As stated in the answer to question 40, agencies will continue to assign ratings on an interim basis. These will provide the basis for additional credit for reduction in force and granting step increases to wage grade employees.

Q 46. Will the Commission and OPM review draft changes in performance appraisal system plans?

- A 46. Staff will be available to provide informal review of proposed systems prior to formal submission. Agencies are encouraged to utilize this service at any stage of the development of a system not only to facilitate final review of plans, but also to assist in developing systems which will best meet the agencies' needs.
- Q 47. My agency has already prepared changes to a current performance rating plan. What should we do with them now?
- A 47. Agencies may continue to submit changes relating to any provisions to be continued on a permanent or interim basis. They should not, however, submit further changes relating to provisions which will not be continued after January 11, 1979. For example, an agency should not submit any changes relating to appeals of ratings, but it may wish to make changes in the employees covered by a plan or the method of appraising performance.

IV. Role and Responsibilities of OPM

- Q 48. How will OPM evaluate the operation of agency systems?
- A 48. OPM will evaluate the operation of agency systems based on factors such as compliance with law and regulation, employee and managerial satisfaction, contributions to organizational effectiveness, and evidence of appropriate use of performance information in personnel decisions.
- Q 49. What types of technical assistance will OPM provide agencies in developing performance appraisal systems?
- A 49. Specific services planned include short-term advice and consultation on agency policy changes and technical aspects of system development, establishment of a clearinghouse of performance appraisal information, and informal review of proposed agency systems.

The Guide to Improving Performance Evaluation and the Performance Appraisal training course (which is oriented toward the needs of supervisors) are available.

We also hope to be able to provide written materials such as case studies on use of different methods and techniques, guidance on setting standards of performance, guidance on writing contract specifications, evaluating proposals, and monitoring contractors' progress, and a supervisors' handbook on dealing with performance problems in the near future. Longer-range forms of assistance are under consideration, as well as other short-range actions. We welcome agencies' views on the most useful types of long and short-term assistance.

Personnel 2

MAY 11 1981

Office of Personnel (05A)

SES Positions and Appointments

I have reviewed the Board's November 14, 1980, justification for two additional SES positions. It is still necessary that two Deputy Vice Chairman positions be established in the Senior Executive Service.

SYDNEY J. SHUMAN
Chairman, Board of
Veterans Appeals (01)



Veterans
Administration

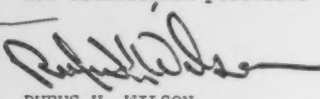
Memorandum

To: Department and Staff Office Heads

Subj: SES Positions and Appointments

Date: May 7, 1981

1. Recently, the Office of Personnel Management issued two memorandums related to the establishment and staffing of Senior Executive Service positions (copies attached).
2. The first memo advises that the Office of Personnel Management (OPM) is suspending Qualifications Review Board (QRB) operations until further notice. Since a QRB must approve an individual's executive qualifications before that individual can be given a career appointment to the SES, we will be unable to effect any new career SES appointments. However, we can and will continue with the various phases of the internal merit staffing process which must precede identification of a candidate for career SES appointment. This includes issuing vacancy announcements and ERB evaluation of applicants.
3. OPM's second memorandum returned our December 1980 request for additional SES positions and advised us to reassess our executive resource allocation in light of the new Administration's budget and program priorities. Mr. Cleland had requested SES slots for the thirty-one positions identified on the attached list. I would like you to review this list and reassess whether the positions proposed for your organization are still required. In order to meet the May 15th deadline for submitting our amended SES position request to OPM, I ask that your recommendations regarding the additional SES positions proposed by your organization be forwarded to the Office of Personnel (OSA) by May 11, 1981. You should also critically assess the need to retain current SES positions; and, if possible, identify any which can be eliminated.
4. Until we have completed this SES position review and determined agency-wide priorities for new SES positions, actions contingent to the establishment or staffing of any new SES positions will be deferred. However, as noted above, merit staffing actions to identify candidates for established positions will continue.


RUFUS H. WILSON
Acting Administrator

Attachments



United States
Office of
Personnel Management

Washington, D.C. 20415

APR 16 1981

In Reply Refer To

Your Reference

MEMORANDUM TO HEADS OF DEPARTMENTS AND AGENCIES

As agencies were being released from the freeze on new appointments which was imposed at the outset of the Administration, OPM made every effort to maintain the operations of Qualifications Review Boards (QRB), which are prerequisite to new career appointments in the Senior Executive Service. At this time, however, we must request that agencies suspend until further notice the submission of additional cases to OPM for QRB review. Such cases may be considered for later submission in the broader context of resource utilization discussed below. If you have cases presently at OPM awaiting QRB review, we will contact you individually concerning their disposition.

We know that you want to retain the greatest possible flexibility to achieve the President's many important initiatives. It is in this spirit, of ensuring that the SES be staffed thoughtfully and only after you have had time to thoroughly assess your needs, that we make this request.

Even when its theory and structure were first being developed, it was clear that the viability of the SES would be tested most severely during periods surrounding Presidential transitions. In this regard, it is clear that the SES considerations that confront agency top managers at the outset of a new Administration extend well beyond filling individual positions through the QRB process. Your managers must reassess their overall SES resources requirements in light of the new Administration's budget and program priorities and ensure that they have the appropriate mix of SES positions and space authorities available to accommodate their new responsibilities.

In this context, it is essential that SES staffing decisions be made deliberately in light of the related considerations that affect them. I appreciate your cooperation toward that objective.

Donald J. Devine
Director

cc: Director of Personnel



United States
Office of
Personnel Management

Washington, D.C. 20415

APR 20 1981

In Reply Refer To

Your Reference

MEMORANDUM FOR HEADS OF DEPARTMENTS AND AGENCIES

The Civil Service Reform Act of 1978 requires that the Office of Personnel Management annually allocate to the agencies a specific number of Senior Executive Service (SES) noncareer appointment authorities and biennially allocate SES position authorizations. Agency requests for FY-82/83 executive resource allocations were submitted to OPM on or about December 31, 1980.

As part of his overall plan to reduce the cost of Government, the President is determined to reduce Federal civilian payroll costs. In view of the potential impact of pending budget cuts on agency programs, we do not think it appropriate to issue revised executive resource allocations based on agency requests prepared just prior to the change in Administration. These requests were based on certain assumptions regarding budget levels and program directions — assumptions that are no longer correct. Therefore, we are returning the enclosed FY-82/83 executive resources allocation request recently submitted by your agency. In reviewing this request for possible resubmission, you should take into account the new personnel ceilings imposed by OMB and also the possible impact of pending program budget cuts on agency operations.

Generally, this delay in issuance of revised allocations should not hamper agency management in their efforts to implement this Administration's programs because most of the major agencies presently have a surplus of executive position authorizations and noncareer appointment authorities. To illustrate, as of February 28, 1981, over 22 percent of the SES and GS 16-18 positions authorized Government-wide were vacant.

The President and the Congress expect us to reduce the cost of Government while still maintaining quality service to the public. Therefore, I want to emphasize that existing agency executive resource allocations are not inviolable. Each agency's current allocation will be carefully examined to determine whether it is still justified at the present level, or whether a downward (or upward) adjustment is warranted. Our analysis will take into consideration such factors as program budget levels, personnel ceilings, position management practices, and attrition/vacancy rate history. Present allocations for agencies with surplus spaces will be reduced prior to FY-82.

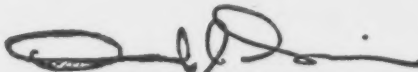
Requests for FY-82/83 executive resource allocations must be submitted by the newly appointed agency head on or before May 15, 1981. Presumably, most agencies will have sufficient budget status information by that time to permit a reasonable accurate projection of executive personnel requirements.

In view of the decrease in the Federal budget over the next two fiscal years, it is expected that a majority of the agencies will request executive space allocations that are substantially below existing levels.

The format to be used for agency requests is identical to that used for the requests submitted in December, 1980, in response to FPM Bulletin Number 920-4B. It should be emphasized that a complete set of current organization charts covering all existing and projected executive (above GS-15 level) positions must be submitted as part of the agency request.

Three (3) complete sets of all documentation comprising the allocation request should be submitted to:

Edward T. Rhodes
Acting Associate Director
Executive Personnel and Management Development
Room 6R48
Office of Personnel Management
1900 E Street, NW
Washington, DC 20415



Donald J. Devine
Director

Enclosure

cc: Directors of Personnel

PROPOSED SES POSITIONSDepartment of Veterans Benefits

Regional Office Director, Buffalo
 Regional Office Director, Columbia
 Regional Office Director, Indianapolis
 Regional Office Director, Manila
 Regional Office Director, Milwaukee
 Regional Office Director, Muskogee
 Regional Office Director, New Orleans
 Regional Office Director, Phoenix
 Regional Office Director, Pittsburgh
 Regional Office Director, Portland
 Regional Office Director, San Diego

Assistant Field Director, Eastern Region
 Assistant Field Director, Central Region
 Assistant Field Director, Western Region

Deputy Director, Vocational Rehabilitation and
 Counseling Service
 Director, Administrative Services
 Director, Personnel Assistance Staff

Department of Medicine and Surgery

Executive Assistant to Associate Deputy Chief Medical Director

Department of Memorial Affairs

Director, Cemetery Service

Board of Veterans Appeals

Deputy Vice Chairman
 Deputy Vice Chairman

Office of Human Goals

Deputy Assistant Administrator

Office of Construction

Deputy Assistant Administrator for Procurement and Construction
 Director of Architecture

Office of Data Management and Telecommunications

Executive Assistant for Policy and Resource Management
 Director, Austin Data Processing Center
 Director, Telecommunications Service
 Director, Technical Advisory Staff

Office of Supply Services

Deputy Assistant Administrator

Office of Management Services

Director, Office of Management Services

Office of Administrative Services

Assistant Administrator

NOV 28 1980

Director, Classification & Compensation
Service (057), ATTN: Joyce Edwards
Amendment to SES Position Justification

This will supplement my memorandum of November 14, 1980, regarding justification for two SES positions for the BVA. The following amendments correspond with the numbered paragraphs of the instructions for position justification, Attachment 3 to FPM Bulletin 920-48.

a. Paragraph 1.B(1). The two Deputy Vice Chairmen will exercise general authority over 15 Board Sections. The staff consists of 173 people with a total payroll cost of \$6,869,900. If some of the annual recurring costs such as overhead are considered, the total dollar amount is \$7,310,900.

b. Paragraph 1.B(2). These positions are necessary in order to confer sufficient authority upon the Deputy Vice Chairmen so that they may effectively direct the decision making of GS-15 Board Members. This responsibility is separable into two tasks:

(1) Insuring the quality of appellate decisions, especially with respect to responsiveness to the contentions presented by appellants, a correct explanation of the applicable law and regulations, and setting forth adequate reasons for the conclusions reached.

(2) Insuring consistency among the Board Sections so that those cases involving identical or similar factual situations will be decided in the same fashion. This responsibility has become critical in recent years because of the publication of an index to all Board of Veterans Appeals decisions and the interest in judicial review of those decisions.

c. Paragraph 1.C. Each Deputy Vice Chairman would be head of an appellate service consisting of up to eight Sections of the Board of Veterans Appeals. There would be approximately 24 GS-15 Board Members assigned to each service. The duties would include insuring that an adequate number of cases are decided each week in order to avoid an unreasonable processing time. The Deputy Vice Chairmen would have primary responsibility for the quality of the appellate decision and consistency among the Board Sections of the particular appellate service (see paragraph 1.B(2)). The incumbent would also perform the functions of Vice Chairman in the absence of this individual.

SYDNEY J. SHUMAN
Chairman, Board of
Veterans Appeals (01C)
JDonsbach:daa 11/28/80

01C20

011

01

TO: Mr. Donsbach

Nov. 24, 1980

SUBJ: Cost Estimate

1. A few days ago you asked me for an estimate of costs that would be under the control of the proposed 2 Deputy Vice Chairmen.

2. Using our planned organization for FY 1981 and our current salaries, these are payroll estimates:

<u>POSITIONS</u>	<u>GRADE</u>	<u>NUMBER</u>	<u>AVERAGE SALARY</u>	<u>SALARY</u>
Deputy Vice Chairmen	SES	2	\$50,112	\$100,224
Secretaries	8	2	22,014	44,028
Board Members (atty)	15	30	50,030	1,500,900
Board Members (Med)	15	15	50,112	751,680
Secretaries	7	18	18,281	329,053
Medical Advisers	15	1	50,112	50,112
Attorneys	14	30	40,655	1,219,650
	13	45	34,153	1,536,888
	12	15	28,086	421,290
	11	15	22,487	337,305
		<u>173</u>		<u>\$6,291,100</u>
			Benefits (9.2%)	<u>578,800</u>
			Total Payroll	<u>\$6,869,900</u>

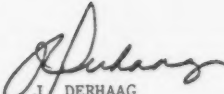
3. There are numerous other direct and overhead costs -- some are in the BVA budget, others are not. In the latter category are such costs as space rental, telephones, and utilities. These are in the budget of the Assistant Administrator for Administrative Services.

4. A breakout of some of the more significant annual recurring costs associated with the elements under the control of the 2 Deputy Vice Chairmen includes: (cost estimates as of 11-1-80)

Payroll	\$6,869,900	
Space Rental	185,700	<u>1/</u>
Travel Board Program	48,000	
Pro-rata Share of Other		
.001 Costs of BVA	<u>207,300</u>	<u>2/</u>
	\$7,310 900	

1/ 19,900 sf @ \$9.33

2/ 173/333 x \$400,000


J. DERHAAG

Joyce Edwards (057)

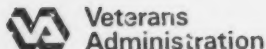
SUBJ: SES Positions for the Board of Veterans Appeals

In addition to the inclusion of two SES positions in the biennial SES adjustment package, I am requesting two additional SES positions for the Board of Veterans Appeals for the current fiscal year.

If you have any questions, please feel free to contact Jan Donsbach, extension 2978.

SYDNEY J. SHUMAN (01)
Chairman, Board of Veterans Appeals 2978

JDonsbach:daa 11/14/80 01C 011 01



Date: 11/14/80

Memorandum

To: Director, Classification & Compensation Service (057), ATTN: Joyce Edwards
 Subj: Justification for Two Senior Executive Service (SES) Positions--Board of Veterans Appeals

1. The basis for the request for two additional SES positions at the Board of Veterans Appeals is the reorganization of the Board into two appellate services with appointment of two Deputy Vice Chairmen to direct the functions of these services.
2. Since 1975 there has been a significant change in public awareness and participation in the Board's appellate process. The most striking example of this new environment was the creation of an index to BVA decisions in July 1977. Subsequently, veterans, service organizations and attorneys have placed greater emphasis on the content of appellate decisions and any possible differences in the results of and reasons for decisions handed down by the Board's 15 Sections.
3. Since 1977 there has been a renewed interest in judicial review of final decisions of the Administrator. Although legislation has not been passed, there have been numerous hearings relating to this subject during which the quality and content of appellate decisions were closely examined. Whether judicial review becomes a reality or not, the Board has an obligation to afford every appellant a well-reasoned and fair decision. This obligation is met by establishing a high level of quality and consistency in the decisions of 15 Board Sections. The role of Deputy Vice Chairman is crucial in fulfilling this obligation. I will discuss the two elements of quality review and consistency.
4. Quality. A quality review system has been established at the Board which provides for the random selection of approximately 10 percent of all decisions dispatched. These decisions are reviewed in detail to determine the quality of the appellate product. The survey of the decision includes the identification of typographical errors, accurate reporting of the evidence, correctness of the issues before the Board and proper application of the laws and regulations pertaining to veterans' benefits. The office of Deputy Vice Chairman was recently created to implement this program and during the year of its existence there has been an improvement in the quality level of appellate decisions. While this program has proven to be of prime importance to the Board's operation, it does not go far enough in avoiding diversity among the Sections of the Board.

2.

Director, Classification & Compensation Service (057)

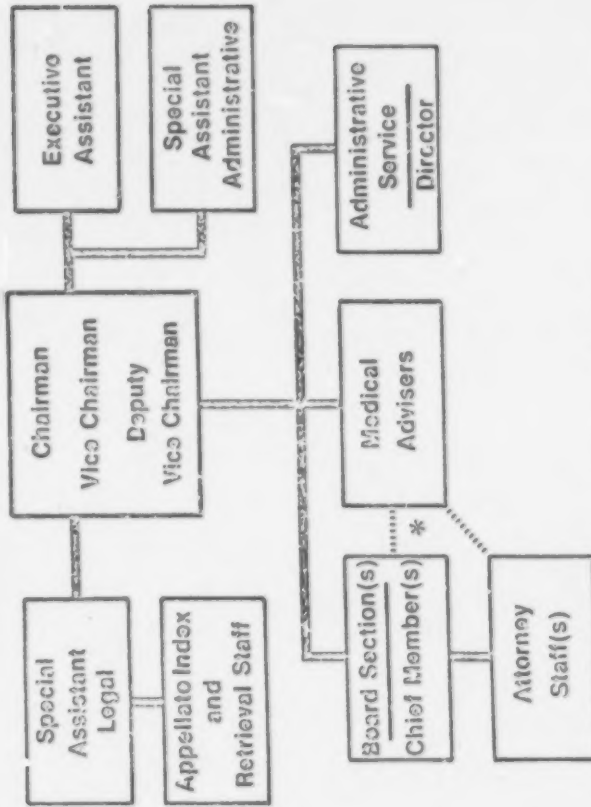
5. Consistency. Decisions of the Board of Veterans Appeals have no legal precedents. It stands to reason, however, that similar factual situations involving the same legal points should be resolved in the same manner. Inconsistency among the appellate Sections might suggest arbitrary and capricious decision-making. This is a standard often used by courts in their review of final agency decisions. Although EVA decisions are not subject to judicial review, the Board still has a responsibility to avoid arbitrary and capricious decision-making. Due to the number of Sections at the Board (15) and the number of appellate decisions made each year (approximately 34,000), it is very difficult to prevent diversity. However, the reorganization of the Board into two appellate services would allow a Deputy Vice Chairman to become thoroughly familiar with the work of no more than eight Sections. Especially in those areas relating to agency policy, public interest or difficult points of law, measures could be taken to insure uniform appellate action. A typical Section of the Board consists of three GS-15 Board Members and up to seven attorneys who prepare the tentative decisions. The Deputy Vice Chairman is in a unique position to meet with the Chief Members of a particular appellate service and work out any differences in the handling of particular appeals. When new issues are presented on appeal, the Deputy Vice Chairman could be effective in establishing a uniform approach to resolving the question at issue. The Deputy Vice Chairmen, in the Senior Executive Service, would have sufficient authority and be in a favorable position to deal with judgmental differences, opposite conclusions and other matters arising out of appeals decided by GS-15 Board Members.

6. The accompanying description of duties assignable to this position and the organization charts are self-explanatory. The creation of these positions would have no significant budgetary impact since the current EVA budget could accommodate the creation of these two new posts.

SYDNEY J. SHUMAN
Chairman, Board of
Veterans Appeals (OIC)

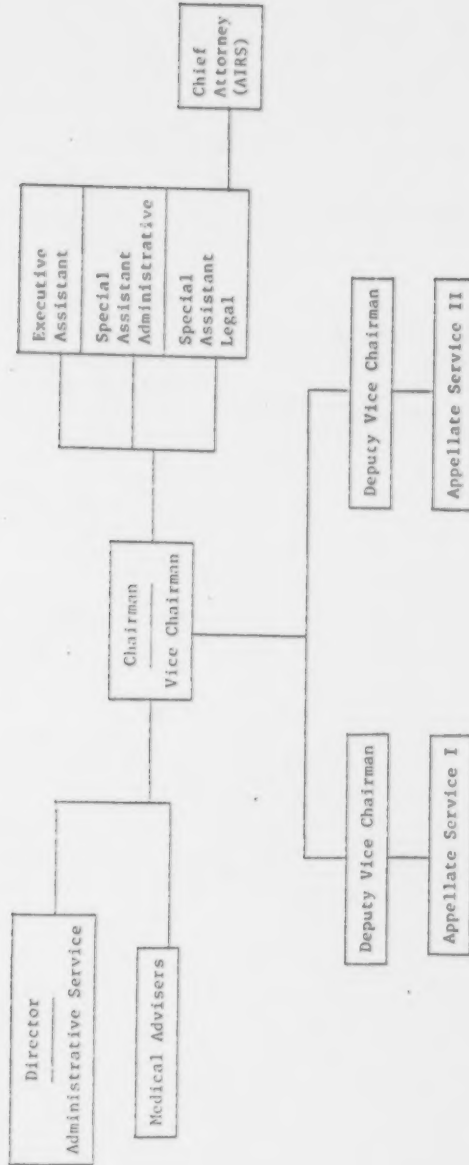
Attachments
Current org. chart
Proposed org. charts (2)
Proposed job description

BOARD OF VETERANS APPEALS



* Dotted line denotes flow of advisory information.

BOARD OF VETERANS APPEALS



BOARD OF VETERANS APPEALS
APPELLATE SERVICES

<u>APPELLATE SERVICE I</u>	
Deputy Vice Chairman	
Secretary	
<u>Subject Assignments</u> Section 1: EENT; Neurology; Agent Orange; Asbestos Section 2: EENT; Neurology; POW Section 3: EENT; Radiation; GU Section 4: EENT; Dental; GU Section 5: VR&E; Corpus & Income; Overpayments Section 6: VR&E; Corpus & Income; Waiver Section 7: VR&E; Corpus & Income; Waiver Section 8: VR&E; Waiver; Education Loan Cases Substitute Administrative Aid	
<u>APPELLATE SERVICE II</u>	
Deputy Vice Chairman	
Secretary	
<u>Subject Assignments</u> Section 9: GSW; SMC Section 10: GSW; SMC; 351 Section 11: GSW; 351 Section 12: Insurance; Domestic Relations Section 13: Insurance; Domestic Relations; Forfeiture Section 14: Insurance; Reimbursement; Legal Section 15: Reimbursement; Loan Guaranty Substitute Administrative Aid	

Board Section

3 Associate Members (GS-15)
 2 Senior Attorneys (GS-14)
 6-7 Attorney-Advisers (GS-9 thru 13)
 1 Administrative Aid (GS-7)

I. PRINCIPAL DUTIES AND RESPONSIBILITIES

A. The incumbent serves as Deputy Vice Chairman, Board of Veterans Appeals. In this capacity he/she is head of an Appellate Service comprising several Sections of the Board. The Deputy Vice Chairman assists the Vice Chairman in managing the operations of the Board of Veterans Appeals. This includes:

- (1) Providing policy guidance to all Associate Board Members in the particular Appellate Service.
- (2) Being responsible for the continuous supervision over the quality and quantity accomplishments in the Sections as well as identifying the professional and managerial/training needs. Through the Special Assistant (Administrative) insures that appropriate training programs are implemented and evaluated as to effectiveness.
- (3) Resolving problems within and among Board Sections regarding interpretations of law and Board procedures and operations.
- (4) Confering with top staff and department officials of the Veterans Administration and other governmental agencies, individual Members of Congress, and officials of veterans' organizations. The incumbent's contacts with the individuals and groups can influence the programs enacted by Congress and administered by the Veterans Administration.

B. With the Chairman and Vice Chairman, the incumbent is a member of the Board's decision-making team. Considers proposals for policy and procedural changes of the Board proposed by the Associate Board Members. Evaluates these proposals with respect to potential impact on the Board's operations and on VA programs and discusses issues which arise in the decision-making process. Makes decisions in those areas delegated by the Chairman or Vice Chairman.

C. The incumbent is responsible for the supervision of the Appellate Service. He/she will recruit, hire and assign all personnel within the Appellate Service. Similarly, the incumbent will be responsible for any adverse or disciplinary actions or counseling of employees in the Service.

D. The Deputy Vice Chairman is responsible for the operation of the Board's professional quality review program with respect to the particular Appellate Service. In such capacity, the incumbent analyzes problems surfaced by such reviews and develops strategies and new policies and procedures to deal with such problems. Discusses problems with Associate Board Members and resolves the problems in consultation with them. Devises means to tie the quality review process into a performance appraisal system for the Board's professional staff. Develops and implements performance appraisal plans.

E. Supervises an Appellate Service consisting of up to 24 Associate Board Members, GS-15; a staff of Attorney-Advisers ranging in grade from GS-9 to GS-14; and a staff of Administrative Aids, GS-7. Evaluates the performance of Associate Board Members on a semiannual basis.

II. SUPERVISORY CONTROLS OVER THE POSITION

The incumbent serves under the broad policy guidance of the Chairman and Vice Chairman. The incumbent is expected to carry out duties in his/her area of responsibility independently and to make decisions within the broad guidelines established by the Chairman and Vice Chairman. The Deputy Vice Chairman perceives the need for modifying policies or developing new policies. Work is evaluated in terms of the effectiveness of the Board operations.

III. OTHER SIGNIFICANT FACTORS

A. Appointed a Member of the Board by the Administrator with the approval of the President of the United States.

B. Must be a Member of the Bar, in good standing.



Veterans
Administration

NOV 12 1980

Date:

Memorandum

To: Department and Staff Office Heads

Subject: SES Position Review

1. On October 30th, the VA Executive Resources Board met to discuss our agency's Senior Executive Service position requirements for FY 82 and FY 83. This memorandum expands on the instructions provided at the ERB meeting and describes the roles of the Office of Personnel, the ERB Subcommittee on Position Management, and the full ERB in reviewing Departmental/Staff Office proposals for new SES positions.
2. Department and Staff Office requests for additional SES positions are to be submitted to the VA Executive Resources Board (OSA) by November 21, 1980. Submissions should identify new positions proposed for FY 82 and FY 83 and any current positions which warrant "upgrading" to SES. If more than one new SES position is proposed, positions should be listed in priority order.
3. Since each proposed position must be fully justified in accordance with the instructions in FPM Bulletin 920-48 (attached), that issuance should be your guide in preparing your submission. Specifically, as detailed in items A and B of the "Instructions for Position Justification" in Attachment 3 to that Bulletin, an organizational chart and a description of duties and responsibilities must be included for each proposed position.
4. The Office of Personnel will analyze Departmental/Staff Office submissions to ascertain if the proposed positions warrant classification above GS-15 and if they meet other criteria for SES inclusion. The ERB Subcommittee will then review and rank the proposed positions and present their recommendations to the full Executive Resources Board. Finally, the ERB will review and vote on these recommendations before they are sent forward for the consideration of the Deputy Administrator and Administrator. Since the agency's request for

2.

Department and Staff Office Heads

new positions must be transmitted to the Office of Personnel Management before December 31, 1980, the timetable for completing these actions is necessarily tight. (See attached)

5. Two Executive Resources Board meetings have been scheduled in conjunction with the SES position review. The first will be on December 12th from 10:00 a.m. to 11:00 a.m., and the second on December 16th from 1:00 p.m. to 3:00 p.m. Both will be held in the Omar N. Bradley Conference Room.

for Michael Clark
CHARLES E. CLARK, Chairman
Executive Resources Board (05)

Attachment

TIMETABLE FOR SES POSITION REVIEW

November 21, 1980	-	Department and Staff Offices submit position proposals to Executive Resources Board
December 5, 1980	-	Office of Personnel completes position analysis and reports to ERB Subcommittee on Position Management
December 12, 1980	-	Subcommittee presents recommendations to full ERB
December 16, 1980	-	ERB meets to vote on Subcommittee recommendations
December 19, 1980	-	ERB recommendations forwarded to Deputy Administrator
December 31, 1980	-	Agency submission transmitted to OPM

Office of Personnel Management

FPM Bulletin 920-48

Special Bulletin # 95

Federal Personnel Manual System**FPM Bulletin**

Bulletin No. 920-48

Washington, D. C. 20415

October 10, 1980

SUBJECT: Allocation of Executive Position and Noncareer
Appointment Authority Authorizations

Action Date: December 31, 1980

Heads of Departments and Independent Establishments.

1. The Civil Service Reform Act of 1978 (CSRA) requires that, during each even-numbered calendar year, each agency (1) examine its Senior Executive Service (SES) position needs, and (2) submit to the Office of Personnel Management (OPM) a written request for a specific number of SES position authorizations for each of the two succeeding fiscal years. This statute also requires that, each calendar year, each agency (1) examine its needs for employment of SES noncareer appointees, and (2) submit to OPM a written request for authority to employ a specific number of SES noncareer appointees during the succeeding fiscal year. The biennial SES position authorization cycle is also an appropriate time for agencies to examine needs for GS-16-18 positions and for scientific/professional (ST) research and development positions authorized by 5 USC 3104. This Bulletin, therefore, is asking for agency requests for SES, GS, and ST position authorizations for fiscal years 1982 and 1983, and also SES noncareer appointment authority requests for fiscal year 1982. The current target date for issuance of OPM allocations is April 1, 1981.
2. The President and the Congress expect us to do all we can to reduce the cost of Government while still maintaining quality service to the public. Therefore, the forthcoming reallocation cycle should not be viewed as an opportunity for agencies to request additional executive position authorizations. On the contrary, each agency should carefully examine its current executive position structure, as well as its needs for fiscal years 1982 and 1983, with a view toward reducing the number of executive positions Government-wide. Each agency's current allocation of executive position authorizations will be carefully examined during the reallocation process by the Office of Personnel Management, in consultation with the Office of Management and Budget. We will determine whether that allocation is still justified at its present level or whether a downward or upward adjustment is warranted. Requests for increases in individual agency position authorizations will be considered, but such requests will be granted only where (1) there have been clearly identifiable and significant increases in agency functions or programs resulting from new legislation or new Administration initiatives which cannot be accomplished by reprogramming, or (2) clear evidence that the previous allocation was too small to permit effective management of agency programs. Also, agencies must demonstrate that positions to be established warrant classification above the GS-15 level.

This Special Bulletin is also being issued as an FPM Letter 920-1

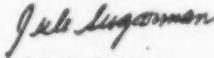
Inquiries: SES Division, EPMD, Area Code 202-632-4486**Code:** 920 Senior Executive Service**Distribution:** Limited (Heads of Agencies, Asst. Secretary for Admin. or equivalent)**Bulletin Expires:** January 20, 1981

3. The forthcoming executive position reallocation cycle is intended to cover agency needs for fiscal year 1982 and for fiscal year 1983 separately; i.e., agency submissions must differentiate between fiscal year 1982 and fiscal year 1983 needs, and these needs must be related to agency budget submissions for those two fiscal years. Please note that a copy of each agency's basic submission will be sent to the cognizant OMB Budget Examiner for review and subsequent consultation with OPM staff. We realize that it is difficult to precisely forecast executive personnel needs on a position-by-position basis over such a long period, and that future changes in Administration and/or Congressional priorities may necessitate adjustments to needs projections. However, since OPM will be working closely with OMB during the entire reallocation cycle, it should be possible for us to respond rapidly to changes in needs dictated by program budget and funding fluctuations inherent in the Federal budgeting and appropriations process. As such situations arise, they will be dealt with on an agency-by-agency basis.
4. With regard to agency needs for SES noncareer appointment authorities, CSRA limited the number of such appointees Government-wide to 10 percent of the total number of SES positions in all agencies. The number of SES positions in any agency filled by noncareer appointees may not at any time exceed the greater of (1) 25 percent of the agency's total number of SES positions, or (2) the number of positions filled on October 13, 1978, (date of CSRA enactment) by (a) noncareer executive assignment, or (b) appointment to level IV or V of the Executive Schedule not requiring Senate confirmation. The foregoing limitation does not apply to agencies having fewer than 4 SES positions. At present, the statutory allowance of SES noncareer appointment authorities allocated to agencies is nearly exhausted. Accordingly, any subsequent allocation of additional authorities will be severely limited. A number of agencies currently have noncareer authorities that may not be needed in the foreseeable future. Those agencies are encouraged to request a smaller number of noncareer authorities in this reallocation cycle.
5. Agencies are asked to reexamine designations of SES positions as either Career Reserved (CR) or General. During the original SES position designation and allocation process, a numerical CR position "floor" was established by each agency. Generally, this floor was determined by adding together (1) the number of GS-16-18 positions which were required to be filled through competitive examination (career executive assignments) just prior to the CSRA implementation date of October 13, 1978, and (2) the number of other executive positions designated for SES which met the CR criteria in the CSRA. Some positions have been designated as CR that do not really meet the CSRA criteria; i.e., positions which do not have to be filled through career appointment to ensure impartiality, or the public's confidence in the impartiality, of Government. While an agency may not violate its original CR position floor without prior OPM approval, some agencies have a number of CR positions in excess of their floor. Therefore, we will entertain requests from those agencies for approval of changes in CR/General designations. Overuse of the CR designation limits staffing flexibility and causes delays in filling positions in situations where immediate staffing is critical, and where "political impartiality" is irrelevant; e.g., most scientific and engineering positions. (Criteria for CR designations are contained in 5 CFR 214.402.)

6. The attachments to this Bulletin provide detailed instructions and formats for preparation of agency submissions. Questions regarding this Bulletin should be directed to the cognizant SES Agency Officer in the OFN Executive Personnel and Management Development Group. Three (3) complete sets of all documentation comprising the allocation request must be submitted by December 31, 1980 to:

Sally H. Greenberg
Associate Director -
Executive Personnel and Management Development
Office of Personnel Management
Room 6R48
1900 E Street, N.W.
Washington, D.C. 20415

7. This report is operational in nature and was declared exempt from interagency clearance by the National Archives and Records Service.



Jule M. Sugarman
Deputy Director

Attachments: 3

EXECUTIVE RESOURCE ALLOCATIONS

A. FACTORS AFFECTING ALLOCATIONS

There are a number of factors that OPM will consider in deciding whether individual agency allocations of position authorization and SES noncareer appointment authorities should be increased, decreased, or remain the same. These factors include:

1. Changes in Functions, Programs, or Organizational Structure

Agency submissions should describe any such changes and their effect in current and projected executive resource needs in terms of (a) the cause of the change, (b) the impact on overall agency funding, budgetary or personnel ceiling situation, and (c) the impact on individual agency components and/or positions. Examples of such change factors would include new legislation, Executive Orders, revision of agency priorities, and reorganizations. Although we will be reviewing various budgetary documents during the reallocation cycle, each agency submission must include projected executive position needs for FY 82 and FY 83 and relate them (insofar as possible) to any projected changes in agency functions and programs. If agency budget projections for FY 82 and FY 83 are significantly different from current funding levels, the agency submission must briefly describe the anticipated effect (if any) on executive personnel needs.

2. Utilization of Existing Allocation

As indicated earlier in this Bulletin, existing executive resource allocations are not inviolable. OPM will reduce agency allocations in cases where existing authorizations are not being effectively utilized and/or are no longer needed. We will be reviewing (a) number of established positions and noncareer appointments vs. allocations, (b) extent to which currently established positions meet the executive level and functional criteria set forth in Title 5 and OPM issuances, (c) vacancy rates and length of time positions are vacant, (d) whether the need for positions is reviewed by ERB as vacancies occur to determine if the position still warrants SES designation, or whether the authorization could be better used elsewhere in the agency, and (e) nature and extent of recruiting efforts.

B. AGENCY SUBMISSION REQUIREMENTS

1. Organization Charts

Each agency is required to submit a complete set of current organization charts which identify all established executive (above GS-15 level) positions by pay system (and grade if applicable); e.g., SES, GS-16, 17, 18, EL-IV, etc. If an agency has unused position authorizations, or is requesting additional authorizations for FY 82 or FY 83, the organi-

zation charts must show both the planned positions (those to be established with existing unused agency authorizations), and the projected positions (those to be established with the requested additional agency authorizations). The total number of unused authorizations is the difference between an agency's current allocation and the total number of positions currently established for which recruiting action has been initiated. There should also be some indication of when the positions are to be established, FY 82 or FY 83. (It is suggested that color codes, asterisks or underlines be used to differentiate among current, planned and projected positions.) The level of detail must be sufficient to show the reporting relationship in the top management structure of an agency or component.

2. Individual Position Justification

If an agency is requesting an increase in executive position authorizations, each projected position (or group of essentially identical positions) must be fully justified in accordance with the instructions contained in Attachment 3 to this Bulletin, "Justification for Executive Position Authorization—FY ____." Similarly, any agency that has "unused" position authorizations must also submit a Justification for each position it plans to establish during FY 82/83 with the unused authorizations. It is essential, therefore, that agencies submit Executive Transactions forms (OPM 1390) at the time executive positions are established so that we have accurate and up-to-date information on agency use of existing position authorizations.

OPM will not confirm existing agency allocations, nor will it consider increasing allocations, until the required Justification form is submitted on all planned and projected executive positions. If the agency is unable to identify a specific position planned for establishment with each of its unused authorizations, documentation must be submitted which fully describes the circumstances surrounding the situation. The foregoing requirement is illustrated as follows: If an agency has a current allocation of 100 authorizations, and has established only 95 positions, it must submit 5 Justification forms. If less than 5 forms are submitted, the agency submission must contain explanatory information. Similarly, if the agency has 5 unused authorizations and is requesting 5 additional ones, then either 10 Justification forms or appropriate explanatory material must be submitted.

Some agencies have received additional position authorizations for special purposes; e.g., mobility, executive development, and the Temporary Assignment Program (TAP). Any agency that wishes to continue using such special allocations, or wishes to initiate programs requiring such allocations, must describe the intended use in detail. It is suggested that agency representatives consult with the cognizant SES Agency Officer prior to preparation of such requests.

3. SES Career Reserved/General Position Designations

Requests for approval of a change in SES position designation from Career Reserved to General, or vice versa, must state whether the change can be made within the agency's existing Career Reserved floor or whether an adjustment in the floor is also requested. Also, a brief justification is required for each requested change in designation. Agencies should refer to 5 CFR 214.402 and FPM Bulletin 920-34 for guidance on determining the proper designation.

4. Noncareer Appointment Authorities

Requests for additional authorities must be justified in terms of the agency's need to employ additional noncareer appointees during Fiscal Year 1982.

U.S. Office Of Personnel Management Attachment 2 to FPM Bn. 920-48
EXECUTIVE PERSONNEL STATUS AND NEEDS SUMMARY

of Agency

PART A - SENIOR EXECUTIVE SERVICE

1. Total Number of Authorized SES Positions (As Of 9/30/80)

2. Total Number of SES Positions Established (As Of 9/30/80)	2-A. Number of SES General Positions Established (As Of 9/30/80)	2-B. Number of SES Career Reserved Positions Established (As Of 9/30/80) Agency Career Reserved Minimum Is: -----
3. Number of SES Positions CURRENTLY Established	As Of: (Provide Most Current Date Available) -----	3-A. Number of SES Positions CURRENTLY Filled
Total SES Position Authorizations Requested		Noncareer Appointment Authorities
4-A. Total FY 82 Needs (Item 1, plus/minus proposed FY 82 changes)	5-A. Total Number Authorized (As Of 9/30/80)	5-C. Total FY 82 Needs (Item 5-A, plus/minus proposed FY 82 changes)
4-B. Total FY 83 Needs (Item 4-A, plus/minus proposed FY 83 changes)	5-B. Total Number Being Utilized (As Of 9/30/80)	5-D. Total FY 83 Needs (Item 5-C, plus/minus proposed FY 83 changes)

PART B - GENERAL SCHEDULE POSITIONS

(Do not include GS 15-18 positions authorized by the Office of Federal Procurement Policy for Agency Boards of Contract Appeals.)

Total Number of Authorized GS 15-18 Positions (As Of 9/30/80)	1-A. Total Administrative Law Judge Authorizations (As Of 9/30/80)
2. Total Number of GS 15-18 Positions CURRENTLY Established	2-A. Total Administrative Law Judge Positions CURRENTLY Filled
As Of >	As Of >
3. Total FY 82 Needs (Item 1, plus/minus proposed FY 82 changes)	3-A. FY 82 Needs for Administrative Law Judge Authorizations (Item 1-A, plus/minus proposed FY 82 changes)
4. Total FY 83 Needs (Item 3, plus/minus proposed FY 83 changes)	4-A. FY 83 Needs for Administrative Law Judge Authorizations (Item 3-A, plus/minus proposed FY 83 changes)

PART C - SCIENTIFIC AND PROFESSIONAL POSITIONS (ST's)

1. Total Number of Authorized Positions Under 5 USC 3104 (As Of 9/30/80)	2. Total FY 82 Needs (Item 1, plus/minus proposed FY 82 changes)	3. Total FY 83 Needs (Item 2, plus/minus proposed FY 83 changes)
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PART D - OTHER EXECUTIVE POSITIONS*

1. Total Number of Authorized Positions (As Of 9/30/80)	2. Total FY 82 Projection (Item 1, plus/minus projected changes)	3. Total FY 83 Projection (Item 2, plus/minus projected changes)
---	--	--

*NOTE: Include all positions authorized by statute which are salary equivalents to SES/GS 15-18/ST positions, but which are NOT subject to OPM allocation purview; i.e., positions that are not covered by the Government-wide limitations in 5 USC 5108 and 5 USC 3104. Do NOT include positions in Executive Schedule Levels I through V.

REPRODUCE THIS FORM LOCALLY

OPM Form 144g (10/80)

U.S. Office Of Personnel Management Attachment 3 to FPM Btn. 920-48

JUSTIFICATION FOR EXECUTIVE POSITION AUTHORIZATION - FY _____

1. Name of Agency		2. Position Title and Organizational Location	
3. Type of Position ☐ SES Career Reserved ☐ SES General ☐ GS-16-18 ☐ ST (Authorized Under 5 USC 3106) ☐ Managerial ☐ Supervisory ☐ Other		4. Number of Professional Positions Supervised ☐ Executive (SES, GS-16 or above, and equivalent) ☐ GS-15 ☐ GS-14 ☐ GS-13 ☐ Other	
POSITION JUSTIFICATION			
(See reverse side and paragraphs B-1 and B-2 of Attachment 1 for instructions.)			

INSTRUCTIONS FOR POSITION JUSTIFICATION

1. SES POSITIONS

The following information must be submitted on each planned and projected position for which an SES position authorization is being requested:

*904 Services
planned*

A. A current (or proposed organization chart which shows (1) the location of the proposed position and all other existing, planned or proposed executive positions in the agency top management structure, (2) the present appointment authority and grade (or level) of positions presently established and being proposed for upgrading or establishment in a different pay system, and (3) all subordinate units that will be reporting directly to the proposed position and the grade or level of all subordinate unit heads.

*noted in
min mem*

B. A description of the duties and responsibilities of the proposed position which includes (1) total dollar amount of funds allocated to (or budgeted for) the programs and projects managed or controlled by the position, and (2) some indication as to the criticalness or priority of such programs or projects; e.g., established by new legislation, new Administration initiative, top agency priority, etc.

*must be
complete
within
2 days*

C. A brief analysis of the grade-controlling duties and responsibilities which make the position classifiable above the GS-15 level.

D. If an SES authorization is being requested for a nonmanagerial position, the justification must include clear and specific evidence that the position meets the SES criteria set forth in 5 USC 3132(a)(2). Specific factors to be addressed would include (1) relationships with top agency management, (2) role in policy determination and implementation, and (3) impact of the position.

2. NON-SES POSITIONS

The following information must be submitted for each non-SES position authorization requested:

A. A current (or proposed) organization chart which shows the location of the position. If the position is presently established and is being proposed for upgrading or establishment in a different pay system, the organization chart should show the present appointment authority, grade or salary level.

B. A description of the duties and responsibilities of the proposed position which clearly indicates why the position does not meet the criteria for SES.

C. A brief analysis of the grade-controlling duties and responsibilities which make the position classifiable above the GS-15 level.

OCT 1 1980

Deputy Administrator (001)

Chairman, Board of Veterans Appeals (01)

Reorganization of the Board of Veterans Appeals (my memo of August 14)

1. The members of the Board have been studying the proposed organization plan and they have asked that I communicate their feelings to you. They believe that the reorganization provides too much and too close supervision which in turn would interfere with the independence they need to make unbiased appellate decisions.

2. They prefer to be removed from merit pay by legislation and if this is not possible they would elect to stay under the merit pay provisions and retain their present supervisory functions.

SYDNEY J. SHUMAN

SJSHUMAN:lsm

9/30/80



*Closed with
Kam Eaton & Jean Butler*

AUG 14 1980

Deputy Administrator (001)

Chairman, Board of Veterans Appeals (01C)

Reorganization of the Board of Veterans Appeals

1. The attached position description for Deputy Vice Chairman and the BVA reorganization plan have been informally approved by the Classification and Compensation Service, Personnel. This position would be in the Senior Executive Service (SES). The Board of Veterans Appeals would be organized into four Appellate Services, each headed by a Deputy Vice Chairman. Each Appellate Service would consist of four Board Sections reviewing cases of similar subject matter. Complete supervision of the Board Sections would be the responsibility of the Deputy Vice Chairman.
2. A representative of the Assistant Administrator for Personnel informed me that although all SES positions within the VA were committed there were actually some vacancies. It appears that there is little likelihood of obtaining four extra SES allocations from the Office of Personnel Management for purposes of the Board's reorganization. I think it would be simpler to effect this within the agency by using four unfilled SES positions already allocated. A biennial SES adjustment package will be prepared in the fall and at that time a request for adjustment in the total number of SES positions permitted within the agency could be made to offset the effect of the contemplated reorganization.

SYDNEY J. SHUMAN

Attachments
Position description
Organization charts (2)

JDonstach:daa

8/14/80

01C

011

01

MEMORANDUM FOR FILE

August 12, 1980

Re: Update Concerning SES Positions
for Four Deputy Vice Chairmen

1. Gerard Maresca, x2426, called to say that the proposed position description of the Deputy Vice Chairmen was supportable as an SES position and that the reorganization plan could be implemented.

He pointed out that, apart from the SES classification issue, he could assist in reorganizing the Board without delay if such was the desire of the Chairman. The SES classification of the Deputy Vice Chairmen could be pending during the reorganization. He referred me to Mrs. Joyce Edwards, x2426, for further information.

2. I spoke with Mrs. Joyce Edwards, x2426, who said that all SES positions in the VA were committed at this time but she understood there were 1,000 vacancies in SES government-wide. She said there were two alternatives available:

a. Submit a request at this time for four additional SES positions. She said she has tried this only once for one SES position and was unsuccessful.

b. Include four additional SES positions in the biennial SES adjustment package for the VA. However, if the positions were allocated in this package, they would not be available until the beginning of FY 1982.

I told Mrs. Edwards I would discuss the matter with Mr. Shuman.

Jan

JAN DONSBACH (OIC)
Special (Legal) Assistant

1. PRINCIPAL DUTIES AND RESPONSIBILITIES

A. The incumbent serves as Deputy Vice Chairman, Board of Veterans Appeals. In this capacity he/she is head of an appellate service comprising several Sections of the Board. The Deputy Vice Chairman assists the Vice Chairman in managing the operations of the Board of Veterans Appeals. This includes:

- (1) Providing policy guidance to all Associate Board Members in the particular appellate service.
- (2) Being directly responsible for the direction and supervision of the professional and administrative activities of Appeals Board Sections and the supporting consultant staff comprising the particular appellate service.
- (3) Being responsible for the continuous supervision over the quality and quantity accomplishments in the Sections as well as identifying the professional and managerial/training needs. Through the Special Assistant (Administrative) insures that appropriate training programs are implemented and evaluated as to effectiveness.
- (4) Resolving problems within and among Board Sections regarding interpretations of law and Board procedures and operations.
- (5) Conferring with top staff and department officials of the Veterans Administration and other governmental agencies, individual Members of Congress, and officials of veterans' organizations. The incumbent's contacts with the individuals and groups can influence the programs enacted by Congress and administered by the Veterans Administration.

B. With the Chairman and Vice Chairman, the incumbent is a member of the Board's decision-making team. Considers proposals for policy and procedural changes of the Board proposed by the Associate Board Members. Evaluates these proposals with respect to potential impact on the Board's operations and on VA programs and discusses issues which arise in the decision-making process. Makes decisions in those areas delegated by the Chairman or Vice Chairman.

C. The incumbent is responsible for the supervision of the Appellate Service. He/she will recruit, hire and assign all personnel within the Appellate Service. Similarly, the incumbent will be responsible for any adverse or disciplinary actions or counseling of employees in the Service.

D. The Deputy Vice Chairman is responsible for the operation of the Board's professional quality review program with respect to the particular Appellate Service. In such capacity, the incumbent analyzes problems surfaced by such reviews and develops strategies and new policies and procedures to deal with such problems. Discusses problems with Associate Board Members and resolves the problems in consultation with them. Devises means to tie the quality review process into a performance appraisal system for the Board's professional staff. Develops and implements performance appraisal plans.

E. Supervises an appellate service consisting of up to 15 Associate Board Members, GS-15; a staff of Attorney-Advisers ranging in grade from GS-9 to GS-14; and a staff of Administrative Aids, GS-7. Evaluates the performance of all Attorney-Advisers assigned to him/her at quarterly intervals. Evaluates the performance of Associate Board Members, Attorneys/Paralegals, and Administrative Aids on a semiannual basis. In conjunction with his/her supervisory responsibility, approves promotions and other personnel actions.

II. SUPERVISORY CONTROLS OVER THE POSITION

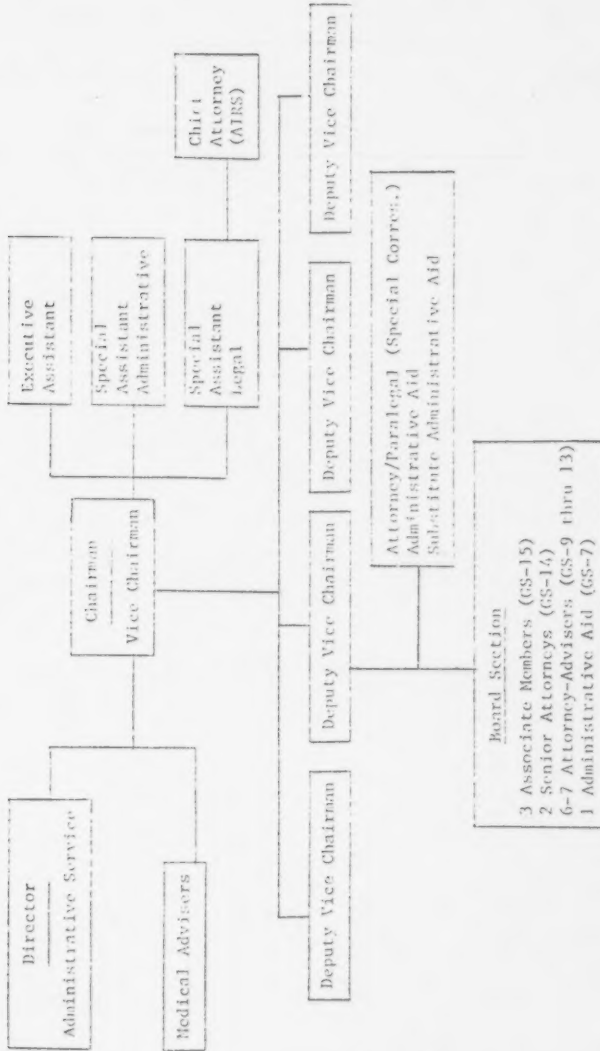
The incumbent serves under the broad policy guidance of the Chairman and Vice Chairman. The incumbent is expected to carry out duties in his/her area of responsibility independently and to make decisions within the broad guidelines established by the Chairman and Vice Chairman. The Deputy Vice Chairman perceives the need for modifying policies or developing new policies. Work is evaluated in terms of the effectiveness of the Board operations.

III. OTHER SIGNIFICANT FACTORS

A. Appointed a Member of the Board by the Administrator with the approval of the President of the United States.

B. Must be a Member of the Bar, in good standing.

BOARD OF VETERANS' APPEALS



BOARD OF VETERANS APPEALS
APPELLATE SERVICES

<u>APPELLATE SERVICE I</u>		<u>APPELLATE SERVICE II</u>	
<u>Deputy Vice Chairman</u> <u>Secretary</u> <u>Subject Assignments</u> Section 1: ENT; Neurology; Agent Orange; Asbestos Section 2: ENT; Neurology; POM Section 3: ENT; Radiation; GU Section 4: ENT; Dental; GU Attorney/ Paralegal: Special Correspondence Substitute Administrative Aid		<u>Deputy Vice Chairman</u> <u>Secretary</u> <u>Subject Assignments</u> Section 5: GSW; SMC Section 6: GSW; SMC Section 7: GSW; SMC; 351 Section 8: GSW; 351 Attorney/ Paralegal: Special Correspondence Substitute Administrative Aid	
<u>APPELLATE SERVICE III</u>		<u>APPELLATE SERVICE IV</u>	
<u>Deputy Vice Chairman</u> <u>Secretary</u> <u>Subject Assignments</u> Section 9: VR&E; Corpus & Income; Overpayments Section 10: VA JE; Corpus & Income; Waiver Section 11: VR&E; Corpus & Income; Waiver Section 12: VR&E; Waiver; Education Loan Cases Attorney/ Paralegal: Special Correspondence Substitute Administrative Aid		<u>Deputy Vice Chairman</u> <u>Secretary</u> <u>Subject Assignments</u> Section 13: Insurance; Domestic Relations Section 14: Insurance; Domestic Relations; Forfeiture Section 15: Insurance; Reimbursement; Legal Section 16: Reimbursement; Loan Guaranty Attorney/ Paralegal: Special Correspondence Substitute Administrative Aid	

File 2
UNITED STATES GOVERNMENT
Memorandum

DATE **MAR 20 1980**
TO **Department and Staff Office Heads**
FROM **Chairman, VA Executive Resources Board (005)**
SUBJ **Staffing SES Positions**

File

1. This memorandum provides information on the actions department and staff office heads should take when it is known that a vacancy in a Central Office SES position will occur. Since specific requirements which may require a considerable period of time must be met in staffing an SES position, action should be initiated as soon as you become aware of a pending vacancy.
2. You should first inform the Chairman, VA Executive Resources Board through the Assistant Administrator for Personnel of the pending vacancy and your recommendation as to how the position should be staffed: a) whether in your judgment the position should be filled through reassignment or transfer of a current Senior Executive, or b) through competitive recruitment either within the Government or both within and outside the Government. The reasons for your recommendation should be included. If your recommendation is to staff the position by reassignment or transfer, furnish the name of the Senior Executive you propose.
3. The Administrator will consider your recommendation along with other alternatives and determine the staffing approach for each vacant position. The necessary staffing action will be initiated at that time. Once a decision has been made, there should be no further discussion or recommendations about the staffing approach because it could be considered inappropriate, improper and inconsistent with the SES merit staffing process.
4. Memorandum dated December 26, 1979, on this same subject, is rescinded.

Richard S. Sweet
RICHARD S. SWEET



Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

U.S. GOVERNMENT
PRINTING OFFICE

Chairman SIMPSON. Next, we will have our next witness, the representatives from the American Legion.

Instead of those on the list as you see it, Paul Egan will be accompanied by John Sommer. John, if I remember correctly, you presented the Legion's testimony on S. 330 back in 1979 at a hearing I was chairing when Al Cranston was unable to be present.

It's good to see you both.

We will follow the procedure of not asking questions after your testimony. Instead, we will ask you to come back and join a panel with the witnesses from the VFW, the AMVETS, and the PVA, after they've each presented their testimony.

We will follow the same procedure with the American Bar Association and the Veterans' Law Center witnesses.

So, please proceed, and with knowledge of the time limitation. Thank you.

TESTIMONY OF PAUL S. EGAN, ASSISTANT DIRECTOR, NATIONAL LEGISLATIVE COMMISSION, THE AMERICAN LEGION, ACCOMPANIED BY JOHN F. SOMMER, ASSISTANT DIRECTOR, NATIONAL VETERANS AFFAIRS AND REHABILITATION COMMISSION

Mr. EGAN. Mr. Chairman, I am Paul Egan of the legislative division of the American Legion.

Mine today is largely a liaison function. And as you already know John, I'll let him proceed. We will both be available for questions.

Chairman SIMPSON. Fine. Thank you.

Mr. SOMMER. Thank you, Mr. Chairman.

The American Legion has 10 of its staff personnel assigned to the Board of Veterans' Appeals. For the past several years, our caseload has been extremely heavy. During the past full year of our reporting system, our staff handled 6,424 cases before the BVA.

The workload has not decreased, nor do we see any prospect of a decrease, given the veteran population and the current state of the economy.

Currently it takes an average of 6 months to complete an appellate action, and that is if there are no intervening extraordinary actions such as remands, independent medical opinions, field examinations, et cetera.

Such special actions appreciably extend the length of time required to complete the appellate action.

Obviously, if the BVA had more sections operating, disposition of cases would be speeded. We certainly can attest that BVA is one element of the VA in which all personnel assigned are always busy.

We would be supportive of any action by Congress to authorize and fund additional personnel for BVA in the interest of expediting decisions which may speed delivery of benefits to claimants.

The position of the American Legion with respect to judicial review of decisions of the Administrator of Veterans' Affairs is set forth in Resolution No. 318, adopted by the 1980 National Convention of the American Legion.

A copy of Resolution No. 318 is attached to our statement, and it is requested that it be made part of the record of this hearing.

Under title I of the bill, adjudication procedures in VA would be codified, by instituting, for a limited period, and in a selected area, an experimental two-tiered adjudication process, and by legislating more frequent visitations at regional offices of traveling boards of the Board of Veterans' Appeals.

In our judgment, the procedures included in title I are simply not necessary. There is nothing wrong with the present adjudication procedure for veterans claims.

An additional adjudicative element would not enhance the ability of the veteran to prove his claim. It would, on the other hand, cause additional delay in the total adjudicative process.

Title II of the bill would cause VA rulemaking to be statutorily subject to the provisions of the Administrative Procedures Act. VA already, as was mentioned earlier, voluntarily complies with the APA, and has done so for several years, and has no indicated intention of not doing so.

Title III of the bill sets up provisions for judicial review of veterans claims. The American Legion has consistently opposed the judicial review of veterans claims, and continues to do so on the basis of Resolution No. 318, as I previously mentioned.

The conclusion we draw from the points we present is that veterans, under the present system of claims adjudication, within the agency, receive more consideration and have a better chance to develop their claim successfully than they would if the possibility of litigation in the Federal courts loomed over each case.

In the first place, entry of veterans' claims into the Federal judiciary system would immediately place the veteran in an adversary relationship to the United States, in seeking approval of claims.

The next point concerns application of the rules of evidence. As soon as a veteran's claim enters the Federal judiciary system, the rules of evidence will apply. This is not now the case in the VA adjudication system. Presently, VA will consider and often act on hearsay evidence, second and even in some cases third-hand evidence, none of which would be admissible in a court of law.

Next, there is the matter of the doctrine of *res adjudicata*.

It is our judgment that if judicial review of claims is instituted, the doctrine will be applied by the judiciary. Presently, we are able to secure the multiple reopening of claims by submitting new arguments based on already reviewed evidence, and sometimes by the device of securing transfer of the claim to different rating agencies within the VA.

Res adjudicata would put an end to this helpful practice.

S. 349 provides that trial of cases under the act could not be *de novo*. This is no comfort to us, because the Federal judge will still be reviewing evidence in accordance with the regulations and practices of the Federal Judiciary; and, as we have attempted to make clear, the climate there would not be as favorable to veterans as the climate within the VA.

Title IV of the bill deals with the sensitive matter of attorneys fees. Under the bill, as much as 25 percent of benefits gained under judicial review could be paid to attorneys.

Given the fact that most claimants for benefits from VA are poor, this is not acceptable to the Legion. Presently, claimants have

available the services of a number of veterans organizations which are committed to working for the welfare of veterans and which have large, trained staffs, all of whom are paid by the organizations to act as advocates without cost to the veteran.

Based on our 60 years of experience in veterans claims work, it is our considered judgment that there will be more and more cases lost than won when the VA system becomes subject to the examination and imposed judgment of Federal judges.

On the basis of the arguments adduced herein, it is the recommendation of the American Legion that S. 349 is neither necessary nor desirable legislation, and we hope that the committee will so conclude.

Thank you, Mr. Chairman.

Chairman SIMPSON. Thank you very much for your testimony. [The prepared statement of Paul S. Egan and John F. Sommer, and the American Legion's response to written questions submitted by Hon. Alan Cranston, ranking minority member of the Senate Committee on Veterans' Affairs, follow:]

PREPARED STATEMENT OF JOHN F. SOMMER, ASSISTANT DIRECTOR
NATIONAL VETERANS AFFAIRS AND REHABILITATION COMMISSION
THE AMERICAN LEGION
BEFORE THE COMMITTEE ON VETERANS AFFAIRS
UNITED STATES SENATE
JULY 15, 1981

Mr. Chairman and Members of the Committee:

The American Legion appreciates the opportunity to present its views on S. 349 which the Committee has for consideration, and on the matter of the work load at the Board of Veterans Appeals. We shall first offer comment on the work load at the Board of Veterans Appeals (BVA).

We shall not in this statement deal with the size of the case load at the BVA, nor with adequacy of assigned personnel to handle the case load. Statistical data and personnel strength are matters for the Committee to discuss with representatives of the Veterans Administration. We will merely comment on our experience with the BVA.

The American Legion has 10 of its staff personnel assigned to the BVA. For the past several years our case load has been extremely heavy. During the last full year of our reporting system, our staff handled 6,424 cases before the BVA. The work load has not decreased, nor do we see any prospect of a decrease given the veteran population and the current state of the economy.

The object with appeals is, of course, to have cases disposed of as expeditiously as possible in the interest of speeding delivery of benefits to claimants. Currently it takes an average of six months to complete an appellate action, and that is if there are no intervening extraordinary actions such as remands, independent

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medical opinions, field examinations, etc. Such special actions appreciably extend the length of time required to complete the appellate action.

Obviously, if the BVA had more sections operating, disposition of cases would be speeded. We certainly can attest that BVA is one element of the VA in which all personnel assigned are always busy. We would be supportive of any action by Congress to authorize and fund additional personnel for BVA in the interest of expediting decisions which may speed delivery of benefits to claimants.

We shall now address ourselves to S. 349, a bill to amend title 38, United States Code, to establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans Administration; to apply the provisions of section 553 of title 5, United States Code, to rulemaking procedures of the Veterans Administration; to provide for judicial review of certain final decisions of the Administrator of Veterans Affairs; to provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws administered by the Veterans Administration; and for other purposes.

The position of The American Legion with respect to judicial review of decisions of the Administrator of Veterans Affairs is set forth in Resolution No. 318 (Ohio), adopted by the 1980 National Convention of The American Legion. A copy of Resolution No. 318 is attached to this statement, and it is requested it be made part of the record of this hearing.

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The American Legion does not support the enactment of S. 349. We do not believe it is needed legislation, or that it would operate to the advantage of veterans generally.

Under Title I of the bill, adjudication procedures in VA would be codified, by instituting, for a limited period, and in a selected area, an experimental two tiered adjudication process, and by legislating more frequent visitations at regional offices of travelling boards of the Board of Veterans Appeals.

In our judgment, the procedures included in Title I are simply not necessary. There is nothing wrong with the present adjudication procedure for veterans claims. An additional adjudicative element would not enhance the ability of the veteran to prove his claim. It would, on the other hand, cause additional delay in the total adjudicative process.

The only problem we have now with claims adjudication is the quality of adjudication personnel provided by VA. Most of these are satisfactory, but some are not. In such instances, we do have access to VA management to seek necessary changes in personnel. This can be a frustrating exercise, given the dilatory nature of the bureaucracy, but it can be done, and we do it when necessary.

Legislation is not needed to increase the activity of the BVA. This can be accomplished by the simple expedient of the Congress funding additional personnel at the BVA.

Title II of the bill would cause VA rulemaking to be statutorily subject to the provisions of the Administrative Procedure Act. VA already, voluntarily complies with the APA,

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and has done so for several years, and has no indicated intention of not doing so. In these days when Congress is perhaps enacting too much rather than not enough legislation, we do not recommend legislation to achieve what has already been accomplished.

Title III of the bill sets up provisions for judicial review of veterans claims. The American Legion has consistently opposed the judicial review of veterans claims, and continues to do so on the basis of American Legion resolution No. 318 (copy attached to statement).

On the simple face of it, it would seem strange that an organization like the Legion, which has been engaged in assisting veterans to develop and present claims before the Veterans Administration for fifty years, would be opposed to a procedure that would open an additional avenue to the individual claimant in pursuing his quest for benefits. The fact is, however, that judicial review is one of those instances where things are not always what they seem to be - especially in the development of governmental procedures.

Permit us to present some of the reasons that lead us to make such a statement. And let us first say that the conclusion we shall draw from the points we intend to present is that veterans, under the present system of claims adjudication, within the agency of the Veterans Administration, receive more consideration and have a better chance to develop their claim successfully than they would if the possibility of litigation in the federal courts loomed

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over each case while it was in the process of development and presentation before local Rating Boards and the Board of Veterans Appeals. And let us add that part of the problem lies in the fact that the average person, including attorneys, would not understand how this could be so - because they are not experienced in claims development and presentation. It is necessary to engage in this work, and to know how the VA adjudication system works, in order to take advantage of the various avenues that can be used to promote successful consideration of claims.

In the first place, entry of veterans claims into the federal judiciary system would immediately place the veteran in an adversary relationship to the United States, in seeking approval of claims. This is not now the case in adjudication of claims by the Veterans Administration. The present relationship of the claimant to VA is a cooperative one, in which both parties seek to develop the claim to the fullest extent before it is adjudicated. An adversary relationship immediately requires that as the claimant seeks to prove - and we note parenthetically, - not establish - but "prove," his claim, the Government must seek to prevent him from doing that, and must challenge any and all allegations the claimant may put forward, that are not clearly and conclusively supported by direct evidence.

This brings us to the second point; application of the rules of evidence. As soon as a veteran's claim enters the federal judiciary system, the rules of evidence will apply. This is not now the case in the VA adjudication system. Presently, VA will consider

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and often act on hearsay evidence, second, and even third hand evidence - none of which would be admissible in a court of law. Over the years the Legion has secured favorable decisions in literally thousands of cases based on tangential evidence that a court would never admit.

Next, there is the matter of the doctrine of res adjudicata. It is our judgment that if judicial review of claims is instituted, the doctrine will be applied by the judiciary. That would be a serious blow to the present efficacy of claims procedure. Presently, we are able to secure the multiple reopening of claims by submitting new arguments based on already reviewed evidence, and sometimes by the device of securing transfer of the claim to different rating agencies within VA. Res adjudicata would put an end to this helpful practice, and the result would be that we would lose on a significant number of claims in which we are now succeeding. We do not wish to give up this condition of maximum accessibility to the VA adjudication system.

Let us give you an example of what we are talking about. Last year we indentified twenty two (22) individual claims in which The American Legion held Power of Attorney, and which we pursued through the appellate process. In each of those 22 claims, the BVA held that the local board of jurisdiction had correctly evaluated the evidence. Then the BVA proceeded to hold that on the basis of a difference of opinion, the local board be overruled and all benefits sought were granted.

In the face of judicial review, BVA would know that its

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decisions would be subject to examination by a Federal Judge and such practices would stop. The BVA would simply go by the book and let any Federal Judge who wished to do so, grant benefits sought. Frankly, we would much rather entrust our fortunes to the BVA than to a Federal Judge who would evaluate all cases on the basis of Federal Rules of Evidence.

S. 349 provides that trial of cases under the Act could not be de novo. This is no comfort to us, because the Federal Judge would still be reviewing evidence in accordance with the regulations and practices of the Federal Judiciary; and, as we have attempted to make clear, the climate there would not be as favorable to veterans as is the climate within the VA.

There is nothing in the language of S. 349 that would, in our judgment, operate to the advantage of the veteran claimant. Instead much of the language would inhibit the favorable aspects of the procedures now available to the claimant.

Title IV of the bill deals with the sensitive matter of attorneys' fees. The generous provisions in the bill will surely result in the bill being labelled as an attorneys relief act - though not by us.

Under the bill, as much as 25% of benefits gained under judicial review could be paid to attorneys. Given the fact that most claimants for benefits from VA are poor, this is not acceptable to the Legion. As is stated in our Resolution No. 318, the payment by veterans of costs to obtain benefits due them from the United States, is abhorrent to the Legion. Presently, claimants

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have available the best counsel of VA employees. Additionally they have available the services of a number of veterans service organizations which are committed to working for the welfare of veterans and which have large trained staffs, all of whom are paid by the organizations to act as advocates without cost to the veteran, and to assist the claimant in obtaining all benefits due.

Even though veterans who might choose to avail themselves of the right to judicial review, and who would retain and agree to pay for the services of attorneys, would do so willingly and knowingly, the fact remains that they would be paying for something to which they are basically entitled from funds they need for other purposes. We hope Congress is not going to put veterans in this position.

Under a Judicial Review Act, there would probably be some cases won. The VA system is not perfect, because no system is. Based on our sixty years of experience in veterans claims work, it is our considered judgment that there will be more cases lost than won when the VA system becomes subject to the examination and imposed judgment of Federal Judges. In other words, we believe veterans are, in the main, treated more generously by this Government under the present VA system of adjudication than they would be were they subjected to the tender mercies of the Federal Judiciary. In making this statement, bear in mind, it is not the function of the Legion to protect the interests of the Government. The Government has all the power and

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majesty of its sovereignty to do just that. It is our function to look to the welfare of the nation's veterans, and that is the sole motivation in establishing our position vis a vis judicial review.

Mr. Chairman, and Members of the Committee, on the basis of the arguments adduced herein, it is the recommendation of The American Legion that S. 349 is neither necessary nor desirable legislation, and we hope the Committee will so conclude.

Attachment: Resolution No. 318 (Ohio)

SIXTY-SECOND ANNUAL NATIONAL CONVENTION OF THE AMERICAN LEGION
BOSTON, MASSACHUSETTS, AUGUST 19, 20, 21, 1980

RESOLUTION: No. 318 (Ohio)

COMMITTEE: Veterans Affairs and Rehabilitation

SUBJECT: Oppose legislation which would authorize judicial review of
the decisions of the Administrator of Veterans Affairs

WHEREAS, The American Legion is committed to the interests and
the well-being of all veterans, their dependents and survivors who seek
benefits from the Veterans Administration; and

WHEREAS, from the time of its founding, The American Legion has
provided direct assistance to veterans, their dependents and survivors in
filing, developing and presenting claims for benefits from the VA without cost
to the veteran, and without regard to membership in The American Legion;
and

WHEREAS, the experience of The American Legion in more than
sixty years of claims work has demonstrated that the present system of claims
that is administered by VA works to the best advantage of the claimant in that
it does not involve cost to the veteran, is not an adversary proceeding and
permits the informal presentation of evidence that operates to the advantage of
the claimant; and

WHEREAS, there has been introduced in the Congress, legislation
that would permit claimants for benefits from VA to institute litigation in the
Federal courts, in furtherance of their claims; and

WHEREAS, such litigation is presently not permitted by reason of the
provisions of section 211 (a) of title 38, United States Code, which provisions
codify existing law; and

WHEREAS, all claimants seeking benefits from VA have the right, as
do all citizens, to seek judicial relief in matters involving their constitutional
rights; and

WHEREAS, the principal reason advanced in support of judicial review
of veterans claims is to insure the claimant's access to due process; and

WHEREAS, on the basis of its long experience in claims work, The
American Legion is convinced that claimants presently receive more
consideration under due process within the VA system of adjudication of
claims than would be provided by judicial review, given the facts that judicial

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review would place the claimant in an adversary relationship with the government, and would require the claimant to adhere to the rules of evidence in support of the claim, which is not presently the case within the VA adjudication system; and

WHEREAS, under the doctrine of "res judicata" a court decision would preclude a reopening of the claim on the veteran's part, as contrasted by the VA's rules and practices which permit almost unlimited reconsiderations; and

WHEREAS, the prospect of the claimant paying in any fashion to obtain benefits due him from the Government of the United States is abhorrent to The American Legion; now, therefore, be it

RESOLVED, by The American Legion in National Convention assembled in Boston, Massachusetts, August 19, 20, 21, 1960, that The American Legion shall continue to oppose the enactment of any measure that would amend 38 USC 211(a) so as to authorize judicial review of the decision of the Administrator of Veterans Affairs except as presently authorized in 38 USC 775 and 784, and Chapter 37 of such title.

APPROVED WITH AMENDMENT

RESPONSE OF THE AMERICAN LEGION TO WRITTEN QUESTIONS SUBMITTED BY HON. ALAN CRANSTON, RANKING MINORITY MEMBER OF THE SENATE COMMITTEE ON VETERANS' AFFAIRS

Question 1. On page 3 of your statement, you mention one limited provision in title I of S. 349—the provision that would require the VA to test alternative means of speeding up the claims adjudication process—and then go on to say that, in your judgment, “the procedures included in title [I] are simply not necessary”. I would contrast that with the Legion's statement on S. 330 in which, except with respect to one provision that has since been modified in response to your concerns, you said that the Legion either had no objection to or supported the various provisions in title I. What explains the change in your views on these provisions relating to internal adjudication procedures?

Answer. In statement presented to the Committee on Veterans' Affairs on February 22, 1979, The American Legion witness stated, with reference to section 107 of S. 330: “Section 107 would authorize the Administrator to initiate a pilot program calling for pre-BVA hearings at the regional office at which the claim was originally filed, by three adjudication employees who had not previously considered the claim, or if there are not sufficient personnel to do so there, at the nearest VA office with enough personnel available for that purpose. This new level of *de novo* review would take place subsequent to the filing of a Notice of Disagreement.

“It is our feeling that adding another adjudicative layer as proposed in this section would prove to be a burden on the limited number of available personnel at the various regional offices, especially where there are a limited number of rating board members. At the present time a claimant may request a hearing at the regional office level prior to a final rating decision by the local rating board.”

We believe our statement of July 15, 1981 is consistent with our statement of February 22, 1979.

Question 2. S. 349 expressly precludes a court from conducting a *de novo* review of the facts of a VA case. Thus, there would be no opportunity for a court to utilize the Federal rules of evidence. Nevertheless, you continue to express your concerns that courts would ignore this specific prohibition, would conduct a new trial, and, in so doing, would rely on the Federal rules of evidence to exclude evidence now admitted by the VA. Although I don't understand why a court would want to exclude evidence in a case in which the claim had already been denied or how, even if such an unlikely event were to occur, the claimant would be in a worse position than at present, would you please suggest how the bill could be modified further to prevent such a result?

Answer. We do not believe further modification of the bill would completely protect the veteran's ability to secure consideration of secondhand evidence within the VA adjudication process. The scenario we visualize is that if a veteran takes his case to court and attempts to submit additional evidence in support thereof, the judge will decide whether to accept the evidence based on Federal rules of evidence. If the judge rejects the evidence as not meeting Federal standards of evidence, then, in our opinion, in the face of a negative ruling by a court, VA will not under any circumstances accept such evidence, should the veteran subsequently attempt to submit it in support of the claim.

Question 3. You also suggest that the doctrine of *res judicata* would enter into VA decisionmaking processes if judicial review were to be allowed. Again, a provision in the bill—section 106—would expressly amend section 4004 of title 38 to provide that a judicial decision “shall not diminish” the Board's authority to reopen a claim. Again, would you please suggest how the bill could be modified so that it could be made more clear that the doctrine of *res judicata* will not apply to in any way restrict the VA's authority to reopen and review previously entered decisions if judicial review is allowed.

Answer. The problem we have with the revision of section 4004 of title 38, United States Code is our fear that the Board of Veterans Appeals, an administrative agency, will be intimidated by the ruling of a Federal judge.

The only suggestion we can make to meet this fear of ours, is for the law to include language such as: The doctrine of *res adjudicata* shall not apply in any case involving a claim for benefits under laws administered by the Veterans' Administration.

Whether such language would strengthen the claimant's ability to continue to pursue the claim within the VA's adjudicative system, only experience will demonstrate.

Chairman SIMPSON. And now, Mr. Schwab.

Don Schwab, Director of the National Legislative Service for the VFW.

Please proceed, Mr. Schwab.

TESTIMONY OF DONALD H. SCHWAB, DIRECTOR, NATIONAL LEGISLATIVE SERVICE, VETERANS OF FOREIGN WARS OF THE UNITED STATES, ACCOMPANIED BY FRANK CLARK, VIETNAM VETERAN AND CHIEF APPEALS CONSULTANT WITH THE BOARD OF VETERANS' APPEALS

Mr. SCHWAB. Mr. Chairman, thank you.

In accordance with your request, I'll summarize my statement, with the understanding——

Chairman SIMPSON. Please.

Mr. SCHWAB [continuing]. That it will be published in full.

The gentleman on my right is Frank Clark, a Vietnam veteran, who is our Chief Appeals Consultant with the Board of Veterans' Appeals. And I would commence my remarks by saying that our claims consultants who work at the BVA hold this forum in high esteem, and believe they are doing a very professional job under the heavy workload they are carrying and the personnel constraints they have experienced over a number of years.

One of our concerns is with the processing time before the Board of Veterans' Appeals, which has run more than 100 days lately after receipt of the case by the Board.

Many of those who appeal their cases are poor. They are in dire financial straits. Their case has been pending for months. And they are experiencing extreme anxiety. And we would like to see this time reduced.

In addition, it is our view that administrative cost constraints have created de-emphasis on the importance of personal appearances at hearings on the part of the BVA. It is current practice for most cost-effective reasons that all BVA sections are nontranscribing.

That is, the tapes of hearings are transcribed on an appeal action only if specifically requested or if the Board decides to remand the case for further development.

We understand with the high cost of such undertakings, that every reasonable effort must be cost effective in these times of budgetary constraints.

It is our view, however, that when such is undertaken, every appeal heard by the various sections—and here there is an editorial mistake—I say “should” and it should read “must”—be attended by a staff assistant who will be preparing the workup of the case for final Board action.

Even though a staff assistant may make use of the tape-recorded transcript of the hearing during the workup of the appeal, we believe his or her presence at the hearing should be required. To do less would serve to deprive the appellant of due process.

Now, the witness from the Board of Veterans' Appeals, the Chief Counsel, said that they do this now, but it is not mandatory. It's discretionary. And sometimes it happens and sometimes it doesn't. And we think that it must be at each hearing.

Another problem that has created low morale in the BVA is the contemplated move of that function from the central office in the BVA to the regional office on North Capitol Street.

And I would just state that when President Roosevelt signed the Executive order establishing that Board, he meant it to be the highest tribunal body for the veterans claims, and thus housed in a place commensurate with its stature.

Consequently, among the provisions of his Executive order was that the Board should sit at the central office of the VA. And I underscore that. I don't think any move should be made until the new Administrator has been sworn in, as he'll be today, and has an opportunity to review this move which has caused bad morale among the Board members.

Mr. Chairman, I'll not belabor you with the recitation of the titles of S. 349. I think everybody is aware of them. Suffice it to say that our last national convention mandated us to support judicial review of the final decisions of the Administrator of Veterans' Affairs as enunciated in our current Resolution 680, which is appended to my testimony.

Chairman SIMPSON. Thank you very much.

Mr. SCHWAB. Our resolution does not address attorneys fees, Mr. Chairman. But we believe that the \$10 fee which was established in 1924 is wholly unrealistic and untenable, and effectively denies veterans the right of choice of representation.

I point out in my testimony an advertisement in a 1924 issue of our VFW magazine listed the starting salary for railway mail clerks as \$1,600 a year. And that's when the \$10 fee was established.

We believe, sir, that there is no more crucial stage of an appeal than the initial appeal, at the regional office. True, the VA will assemble the clinical records from the Department—the appropriate Secretary within the Department of Defense, and VA clinicals if they're available.

This is the point where the work really begins, where the representative must meticulously review the file, consult with the complainant, work up the case, develop the case, decide what statements are needed from physicians, family friends, buddies in service.

He must search the claimant's mind to see what he hasn't brought out, how best to proceed with the case. And only then make his presentation of the case. It's very important that this be done with a view toward an allowance of the case.

Because once an adverse decision is rendered at the regional office, and human nature being what it is, the initial denial may prejudice the case in further appeals.

We don't champion attorneys or attorneys' fees. We really don't believe an attorney is necessary or really cost-effective in these claims. But we do champion the right of the veteran, his dependents or survivors, to choose what representation they want in the prosecution of the case. The \$10 fee effectively denies that right to those who make appeals.

I would stop there, sir, and wait for questions later.

Chairman SIMPSON. I thank you very much.

[The prepared statement of Donald H. Schwab, director, National Legislative Service, Veterans of Foreign Wars, follows:]



VETERANS OF FOREIGN WARS OF THE UNITED STATES

NATIONAL LEGISLATIVE SERVICE

Office of Director

PREPARED STATEMENT OF

DONALD H. SCHWAB, DIRECTOR
NATIONAL LEGISLATIVE SERVICE
VETERANS OF FOREIGN WARS OF THE UNITED STATES

BEFORE THE

COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE

WITH RESPECT TO

OVERSIGHT OF THE OPERATION OF THE BOARD
OF VETERANS APPEALS AND JUDICIAL REVIEW OF THE DECISIONS
OF THE ADMINISTRATOR OF VETERANS AFFAIRS

WASHINGTON, D. C.

JULY 15, 1981

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

Thank you for the privilege of appearing before this distinguished Committee to present the views of the Veterans of Foreign Wars of the United States.

My name is Donald H. Schwab and it is my privilege to serve the more than 1.9 million men and women of the Veterans of Foreign Wars as their National Legislative Director.

As is a matter of record, the Board of Veterans Appeals is established under the authority contained in 38 USC 4001 and consists of a Chairman, Vice Chairman, 50 members and additional associate members and professional and administrative staff as are necessary to properly conduct the business of the Board. The



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Chairman and Vice Chairman are appointed by the Administrator with the approval of the President.

Mr. Chairman, the professional staff members of the VFW, our Claims Consultants, who daily represent claimants before the BVA hold this forum in high esteem. This is not to infer that our representatives are always happy with the decisions of the Board, and it should not be expected that they would be, but they are convinced that the Board is functioning at a highly professional level and doing a most creditable job under the current heavy workload and personnel constraints. During the fiscal year 1980 the Board rendered decisions in more than 34,000 cases.

Given the foregoing, there is one area where improvement in the Board's operation is highly desirable and that is in the processing time of appeals. The processing time from receipt of a case until announcement of a decision was 97 days last October, was over 100 days the following six months and in this past month climbed to 107 days. Although we would be reluctant to stipulate an optimum number of days, we do believe more timely resolution of appeals is not only possible but obligatory. This, since when a case reaches the BVA it has already been in the adjudication process a number of months and the claimant is often in dire financial straits undergoing extreme hardship and apprehension and the pending appeal is the most important thing in his or her life at that time. The answer, of course, is to increase the membership of the Board which would not only better serve its clientele but relieve the pressure under which members have been operating over a protracted period.

In addition, it is our view that administrative cost constraints have created a de-emphasis on the importance of personal appearances at hearings on the part of the BVA. It is current practice, for cost effective reasons, that all BVA sections are non-transcribing -- that is, the tapes of hearings are transcribed on an appeal action only if specifically requested or if the Board decides to

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remand a case for further development. We understand the high cost of such an undertaking and that every reasonable effort to be cost effective, in these times of budgetary constraint, must be undertaken. It is our view, however, that when such is undertaken, every appeal heard by the various sections should be attended by the staff assistant who will be preparing the workup of the case for final Board action. Even though a staff assistant may make use of the tape-recorded transcript of the hearing during the workup of the appeal, we believe his or her presence at the hearing should be required. To do less may serve to deprive the appellant of due process.

Exacerbating the deleterious effects upon Board members of continually fighting a most heavy workload, their morale has been badly affected by a contemplated movement of the Board from the Veterans Administration Central Office in downtown Washington to the Regional Office on North Capitol Street. Moreover, such a move would serve no useful purpose toward the mission of the Board and result in an untimely and unnecessary expense.

It should be remembered, Mr. Chairman, that when President Roosevelt mandated, in approving Executive Order No. 6230 on July 28, 1933, the establishing of a Board of Veterans Appeals he envisioned the Board as the highest tribunal body for veteran's claims and thus housed in a place commensurate with its stature. Consequently, among the provisions of his executive order was that the Board was to sit at the Central Office of the VA. In connection with the physical location of the Board, we wish to underscore the above: that the BVA sit at the Central Office of the Veterans Administration.

As you know, Mr. Chairman, there have been continuing efforts made to remove the BVA from sitting at the Central Office of the VA. The most recent effort was undertaken by a former-acting Administrator of the VA with the General Services Administration and culminated in contracts for space located at 941 North Capitol

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Street, Northeast, Washington, D. C., being signed on May 29, 1981. The BVA would physically move its operations this September.

Mr. Chairman, the removal of the BVA from the Central Office of the VA has never been justified in our view. On the contrary, such would undoubtedly exacerbate the current workload status at the BVA and, also, be an expensive undertaking during a highly budget-conscious Administration.

Another area that concerns us is the present status of the chief members of each section within the Board of Veterans Appeals. As a result of the Civil Service Reform Act of 1978, these members are presently categorized as falling within the "supervisor" or management official classification resulting in their inclusion within the Merit Pay and Performance Appraisal Systems.

We believe this is totally inappropriate when it is realized that the members' duties are very much akin to those of Administrative Law Judges and as such should enjoy similar judicial independence which would be consistent with the Committee's concern regarding fairness and impartiality. Additionally, upon close examination of the so called "supervisor" duties of the chief members it becomes apparent that in fact the Chairman and Vice Chairman are the only true supervisors. Chief members are basically 1/3 of a playing team with a backup support team of staff attorneys and a secretary. As team members, the chief member's vote on decisions is equal to that of the two other members of the section - not more equal as would be the case in any other arrangement where you have supervisors and subordinates. This being the case, we believe it is both unfair and illogical to label chief members as supervisors. A true supervisor can hire or fire those who are subordinate to him. At the Board of Veterans Appeals, all of the above cannot be done without approval of the Chairman. This makes him the supervisor.

Mr. Chairman, the legislation under consideration this morning, S. 349, identified as the "Veterans' Administration Adjudication Procedures and Judicial

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Review Act" was introduced by the Honorable Gary Hart for himself, the Honorable Alan Cranston, Ranking Minority Member of this Committee and the Honorable Dennis DeConcini, also a member of this Committee. The bill is in five titles briefly described as follows:

Title I - Adjudication Procedures - would increase the membership of the Board of Veterans Appeals from not more than 50 members to not more than 65 members, codify adjudication procedures and mandate a dual study over a period of 24 and 36 months in at least six Veterans Administration Regional Offices involving two alternative methods for the resolution of claims as follows:

1. In at least three geographical areas the Administrator shall provide an intermediate-level adjudication process whereby a claimant may file an appeal and request a de novo hearing before a new panel.

2. In at least three other geographical areas the Administrator shall provide Traveling Boards of the BVA to conduct formal recorded hearings on a quarterly basis each year instead of biennially as at present.

Title II - Veterans Administration Rule Making - would statutorily subject VA rule making to the Administrative Procedure Act.

Title III - Judicial Review - would subject benefit claims adjudicated by the BVA to review in the federal courts to include Federal District Courts, Courts of Appeal and the Supreme Court and would also authorize courts to review and challenge VA regulations and practices.

Title IV - Attorneys Fees - would modify the \$10 restriction on attorneys fees as stipulated in 38 USC 3404 as follows:

(A) Claim resolved within the Agency --

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- (1) resolved before receipt of Statement of the Case: \$10
- (2) resolved after Statement of the Case -- the lesser of
 - (a) fee agreed upon between claimant and attorney
 - (b) \$500 (more in an "extraordinary" case)
 - (c) 25% of past due benefits awarded, in contingent fee cases

(B) Claim resolved via litigation --

- (1) successful claim: "reasonable" fee, up to 25% of past due benefits awarded, in contingent fee cases
- (2) unsuccessful claim: "reasonable" fee, up to \$750

Any agent or attorney fee payable would be paid by the claimant, except that a court could, as an "extraordinary remedy," award a claimant a reasonable attorney fee payable by the government as part of court costs.

Title V - Effective Dates - provides that the act become effective 180 days after enactment and, also, provides for court review of decisions rendered by the BVA on or after January 1, 1977 provided court action is instituted not later than 180 days after the effective date of the act or the mailing of notice by the Administrator to the claimant of his right to bring such civil action.

Mr. Chairman, the legislative posture of the VFW for each ensuing year is established by mandates in the form of resolutions passed by the voting delegates to each National Convention. During our 80th National Convention, held in Dallas, Texas in August 1979, our position changed in that a resolution opposing judicial review was rejected in favor of our supporting court review. Following lengthy and lively debate by those conversant with the ramifications thereof, and several redrafts of the language therein, a resolution was passed supporting "... legislation to provide judicial review of Veterans Administration claims decisions pertaining to matters of law and regulations, insofar as the merits of the claims

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are concerned, and review of facts that are alleged to be arbitrary and/or capricious." Identical language is contained in our current Resolution No. 680 passed by the voting delegates to our 81st National Convention held in Chicago, Illinois this past August, a copy of which is appended to my testimony.

Judicial review, or the absence thereof, of decisions of the Administrator of Veterans Affairs is a subject which has elicited deep and strong emotion among our membership on both sides of the issue over a protracted period of many years. The finality statute, 38 USC 211(a), stipulates: "On and after October 17, 1940, except as provided in sections 775, 784 and as to matters arising under Chapter 37 of this title, the decisions of the Administrator on any question providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise."

Mr. Chairman, restrictive language first surfaced some 94 years ago with passage of the Tucker Act in 1887 now encoded as 28 USC 1346(d). Note 536 of the annotation to this citation clearly reflects Congress' intention to prevent court review of pension claims.

This restriction with respect to court review of veterans benefits was strongly stated in Public Law No. 2 - 73rd Congress, an act "To Maintain the Credit of the United States Government," also known as the "Economy Act of 1933." (This act either repealed or reduced all veterans benefits effective June 30, 1933.) As enunciated in Section 5 thereof, "All decisions rendered by the Administrator of Veterans Affairs under the provisions of this title, or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision."

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Mr. Chairman, while a veteran claimants' access to the federal courts has been foreclosed, potential recipients of other federal benefit programs took advantage of court decisions to elevate the status of their benefits from mere gratuities to the level of statutory entitlements with vested property interest. This trend which commenced in the 1960's culminated in the landmark case of *Goldberg v. Kelly*, 397 U.S. 254 (1970), wherein the Supreme Court concluded that Welfare benefits are matters of statutory entitlements - more likely property interests than gratuities.

Mr. Chairman, it is a strange lesson in logic, indeed, that Welfare recipients and those in the Supplemental Security Income program enjoy the right to judicial review while our veterans, their dependents and survivors are foreclosed from this same avenue of relief following exhaustion of their administrative appeals. If Welfare benefits are not gratuities the word has lost its meaning. Surely veterans benefits are not gratuities notwithstanding repeated rhetoric to the contrary. No veteran has ever received anything for nothing. At the very least those who have served honorably in uniform during periods of war and hostility have given years from their lives, their families and their personal endeavors, if not their mental or physical health or their very lives. No, no veteran has ever received a gratuity, something for nothing. It is interesting to note that the Supreme Court, in *Johnson v. Robison*, 415 U.S. 361 (1974) also noted the sparse and almost non-existent legislative history behind the early versions of that no review provision when it was enacted in 1933 and later amended in 1940.

Mr. Chairman, our current resolution with respect to judicial review is narrowly drawn and would permit dissatisfied claimants to seek relief in the appropriate U. S. District Court in accordance with some of the provisions of 5 USC 706 upon exhaustion of their administrative appeals, meaning that no law suit could be entered until after a final decision had been rendered by the Board of Veterans Appeals. In that way claimants would be barred from going into court immediately after receiving

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an unfavorable decision handed down at the Veterans Administration Regional Office level.

In conjunction with the foregoing, we neither believe such judicial review would flood the federal courts with an unmanageable increase in cases nor, in the absence of the imposition of trial type procedures on the VA, would judicial review do harm to the informal, flexible current review procedure within that agency. Substantiating this belief, a Department of Justice study in 1977 anticipated that judicial review of Veterans Administration claims that were denied would increase federal court cases by approximately 4,600 per year or by 3 percent. Pertinent to this projection is the fact that 152 federal judges have been added since 1977. Of course, formal rules of evidence in the cross-examination of witnesses must not be permitted. Once a case is taken to court de novo review should not be permitted and the judicial review should be limited to the administrative record that was developed at the Veterans Administration Regional Office and the Board of Veterans Appeals. If a case is denied in the appropriate federal district court the claimant must be permitted to reopen the case at the Veterans Administration Regional Office level upon the submission of new, pertinent and material evidence not previously considered. Mr. Chairman, we do believe judicial review as envisioned in our resolution would enhance decision-making within the Veterans Administration. It is an accepted hypothesis that individuals, and, yes, even boards, turn out higher quality more thorough work when the possibility exists that such may be scrutinized by a higher authority.

Mr. Chairman, although our resolution remains silent with respect to attorneys fees, I would suggest to you that the \$10 limitation imposed by 38 USC 3404 is not only wholly unrealistic and untenable, but effectively denies veterans the freedom and right of choice in representation in pursuing a claim with the Veterans Administration. This \$10 limit on attorneys fees was established by Public Law 242 of the 68th Congress approved June 7, 1924 and identified as the "World War Veterans

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Act." According to an advertisement in our VFW Magazine, in 1924 the starting salary for Railway Mail Clerks was \$1,600 a year. I make this point to neither champion the cause of attorneys nor their fees, but, rather, to champion the right of veterans to be represented by legal counsel if that is their choice.

While on the subject of attorneys fees, it is incumbent upon me to take exception, and strong exception, to remarks made in the Congressional Record of January 30, 1981 by Senator Cranston where on pages S. 815 and S. 816 he stated in part ". . . I believe that this limit on attorneys fees is appropriate with respect to the initial claims stage because the initial procedures for applying for VA benefits are relatively uncomplicated, with the VA generally securing the relevant military records and evaluating the merits of the claim. In light of the availability of the highly trained service officers of the national veterans' organizations and other forms of free assistance, there would seem to be no need for the assistance of a private attorney to initiate the claims process by completing and filing an application. Continuing to discourage attorney representation at the initial application and decision stage would thus appropriately serve to protect claimants' benefits without prejudicing the claimant's ability to obtain a legal representative of his or her own choosing for purposes of reconsideration of, or appeal from, an initial denial of a claim."

Mr. Chairman, the foregoing does not accurately reflect the complexity of initial claims or the high quality of service officer representation. First, because there is no more crucial a stage of any claim than the initial presentation which requires thoroughness, considerable expertise and, often, great tenacity. True, upon application the VA will assemble service clinicals and, if they exist, VA clinical records, but this is the point where the real work and a complete knowledge of VA regulations and the rating schedule come into play. The veterans representative must painstakingly review the entire file to ascertain what additional documentation

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is necessary in the form of statements from physicians, family members and friends to fully develop the claim and see that they are obtained if at all possible. He must consult with the claimant and search his mind for pertinent information to determine how best to present the case. Then, and only then, is the case fully developed and the representative in a position to work up his presentation of the case with a view toward obtaining a favorable decision. Allowance of the initial claim is most important since, human nature being what it is, a denial at the Regional Office level may prejudice any subsequent appeal. No, initial claims are neither to be treated lightly nor are they "relatively uncomplicated." Secondly, the inference that initial claims require little knowledge and can be handled by the service officers of veterans' organizations, but that appealing a denied claim requires the services of an attorney is not supported by the facts, is demeaning to our professional claims representatives and, quite frankly, is highly resented by them. According to the VA's own figures, in the last five fiscal years representatives of veterans' organizations have presented 136,789 cases to the BVA with an allowance rate of 12.9 percent. In the same period private attorneys or agents have presented 3,595 cases to the BVA with an allowance rate of 13.6 percent, seven tenths of a percent better than the gratuitous representation of veterans' organization representatives. Keep in mind that veterans' organizations represent without charge anyone naming them on the required power of attorney while, due to the \$10 fee, attorneys must be quite selective in cases they undertake. In addition, a few allowed cases when you represent a small number has great impact on percentages while it requires many favorable decisions to alter the percentage rate when you handle a vast number of cases. Knowing Senator Cranston, as I do, there is no question in my mind it was not his intent to either offend or belittle veterans' organizations service officers, but to protect claimants from possible exploitation. However, in our opinion the importance of initial claims needed clarification.

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In conclusion, Mr. Chairman, if attorneys fees are to be revamped, provision should be made to realistically permit participation in initial claims for sound representation throughout the appeal. I say this, Mr. Chairman, not to enhance the need for attorney representation for I do not believe such is necessary, but to enhance the freedom of choice for the claimant veteran, dependent or survivor.

This concludes my testimony, Mr. Chairman, and I will be happy to respond to any questions you may have.

Resolution No. 680

JUDICIAL REVIEW

WHEREAS, under section 211, Title 38, USC, "the decisions of the Administrator on any questions of law or fact under any law administered by the Veterans Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power of jurisdiction to review any such decision by an action in the nature of mandamus or otherwise"; and

WHEREAS, legislation has been introduced in Congress that would provide for judicial review of administrative decisions made by the Administrator of Veterans Affairs; and

WHEREAS, the current provisions of Title 38, USC, prohibiting judicial review, in many cases, deny to veterans and their beneficiaries, the same rights possessed by all citizens in determinations of entitlements to other federal benefits; now, therefore

BE IT RESOLVED, by the 81st National Convention of the Veterans of Foreign Wars of the United States, that we support legislation to provide judicial review of Veterans Administration claims decisions pertaining to matters of law and regulations, insofar as the merits of the claims are concerned, and review of facts that are alleged to be arbitrary and/or capricious.

Adopted by the 81st National Convention of the Veterans of Foreign Wars of the United States held in Chicago, Illinois, August 15-21, 1980.

Resolution No. 680

Chairman SIMPSON. Let me just state, the various veterans groups are here. There is one notable exception, and that is the usual representation of the Disabled American Veterans.

They are having their national convention in Miami. And they were kind enough to invite me to speak to their national convention on Sunday. I told them to keep the motor running outside the building while I did that. It was very fruitful. I was able to have my side said and I want to commend that organization.

I've learned to enjoy their representatives very much, and they are not present, because of their full convention in Miami.

But they certainly are a very important part of the veterans' expression of opinion in Washington.

So, now, Mr. Gabe Brinsky, please, National Service and Legislative Director of AMVETS.

Senator CRANSTON will now take over the hearing. I must go to the swearing-in of the new Administrator of the VA. That will be a great privilege. I am hoping that he'll take a lot of heat off my poor bald head. [Laughter.]

Gabe, please, proceed.

Senator CRANSTON. Alan, please express my regret for not being there and say one of us had to stay here, so you get to go there.

Chairman SIMPSON. Just like I remember the last time you went, I had to stay. [Laughter.]

Thank you.

Senator CRANSTON [presiding]. Thank you.

Welcome. And I would appreciate it if you could limit your verbal statement to 5 minutes or less. We're pressed for time.

TESTIMONY OF GABRIEL P. BRINSKY, NATIONAL SERVICE AND LEGISLATIVE DIRECTOR, AMVETS

Mr. BRINSKY. We appreciate the opportunity to express our views on S. 349. And as we understand it, the committee is particularly interested in receiving testimony in two general areas; namely, oversight on Board of Veterans' Appeals issues, including its current workload, and the ability to meet the demands created by that workload.

The other issues are that of judicial review and attorney representation of individuals with claims before the Veterans' Administration with or without change to the current preclusion of judicial review.

From the information available to us, there are approximately 14,000 cases which have been developed and are certifiable for appellate review.

A thousand of these cases are presently located at the Board, with the remainder being in the regional offices awaiting call to be forwarded to the Board.

This caseload translates itself into more than 180 calendar days from the time a case is certified as ready for appellate review and a decision is entered.

Since this is an average time, obviously while some cases will be processed sooner, there are others which will remain pending for more than 6 months. The latest information available to us indicates that more than 180 days is required to process a case before it can receive appellate consideration.

Therefore, should a claimant receive an unfavorable determination by the Veterans' Administration, it conceivably could require at least a year before a final decision is entered.

This length of time, under any standard, is unacceptable. It is appreciated that some delays are unavoidable. But a lengthy processing time should be the exception and not the rule. For in many instances, we are dealing with claimants who are dependent upon such benefits, the payment of which is being denied them for a prolonged period of time.

We are of the opinion that the processing time presently required adversely affects due process.

Because of the constraints of time, I will only briefly address S. 349 and request that my complete statement be made a part of the record.

Senator CRANSTON. It will be, and I appreciate that very much.

Mr. BRINSKY. In our opinion, title I, Adjudication Procedures, would only add to the processing time, aggravating an existing serious situation. At the same time, we do not feel that it would improve the quality of the end product. There are also a number of provisions which would provide for procedures already in existence and hence do not require any legislative enactment.

On the issue of judicial review, AMVETS opposes any form of judicial review other than that which would address itself to a review of the legality of regulations and the correctness of legal interpretations.

It is felt in some quarters that in spite of 38 U.S.C. 211(a), the courts are assuming jurisdiction in this area, and therefore such legislation is not required. We are of the impression, however, that this is not universally true.

Some courts have refused to assume jurisdiction because of section 211(a). We therefore feel that such legislation is desirable in order to achieve consistency and to insure judicial review in all cases on the issue of policy and the legality of controlling regulations.

As regards the issue of attorney representation of individuals with claims before the Veterans' Administration, with or without changes to the current preclusion of judicial review, it is our view that there is no need for attorney representation during the various stages of the administrative processes, including appellate review by the Board of Veterans' Appeals.

Our veteran population and their dependents have qualified expert representatives available to them, furnished by the various veterans service organizations, with no cost to them.

For example, AMVETS maintains an appeals officer who is an attorney and a former Chief Member of the Board of Veterans' Appeals. With such expertise available to claimants, there is no need to burden them with attorney fees prior to that time that the legal services of a private attorney are necessary should the judicial course be pursued.

Historically, the primary purpose for the fee limitations for attorneys was to protect the monetary award made to the veteran from unnecessary payment of fees which might have an adverse economic effect upon him and his family.

This concept is also true today. We prefer to have our veterans and their dependents retain as much of their benefits as is possible.

This concludes my remarks, Mr. Chairman.

Senator CRANSTON. Thank you very much.

We may have some questions later, but we do not at this point.

[The prepared statement of Gabriel P. Brinsky, national service and legislative director, AMVETS, follows:]



PREPARED STATEMENT OF
GABRIEL P. BRINSKY
AMVETS NATIONAL SERVICE & LEGISLATIVE DIRECTOR

Before The
COMMITTEE ON VETERANS AFFAIRS

UNITED STATES SENATE

July 16, 1981

WE APPRECIATE THE OPPORTUNITY TO EXPRESS OUR VIEWS ON S.349. IT WOULD AMEND TITLE 38, UNITED STATES CODE, AND AMONG OTHER THINGS ESTABLISH CERTAIN PROCEDURES FOR THE ADJUDICATION OF CLAIMS FOR BENEFITS ADMINISTERED BY THE VETERANS ADMINISTRATION AS WELL AS PROVIDE FOR THE JUDICIAL REVIEW OF CERTAIN FINAL DECISIONS OF THE ADMINISTRATOR OF VETERAN'S AFFAIRS. WE HAVE BEEN INFORMED THAT THE COMMITTEE IS PARTICULARLY INTERESTED IN RECEIVING TESTIMONY IN TWO GENERAL AREAS; NAMELY, OVERSIGHT ON BOARD OF VETERAN'S APPEALS ISSUES, INCLUDING ITS CURRENT WORK LOAD AND THE ABILITY TO MEET THE DEMANDS CREATED BY THE WORK LOAD. THE OTHER ISSUES ARE THAT OF JUDICIAL REVIEW AND ATTORNEY REPRESENTATION OF INDIVIDUALS WITH CLAIMS BEFORE THE VETERANS ADMINISTRATION WITH OR WITHOUT CHANGE TO THE CURRENT PRECLUSION OF JUDICIAL REVIEW.

FROM THE INFORMATION AVAILABLE TO US, THERE ARE APPROXIMATELY 14,000 CASES WHICH HAVE BEEN DEVELOPED AND CERTIFIABLE FOR APPELLATE REVIEW. A THOUSAND OF THESE CASES ARE PRESENTLY LOCATED AT THE BOARD WITH THE REMAINDER BEING IN THE REGIONAL OFFICES AWAITING CALL TO BE FORWARDED TO THE BOARD. THIS CASE LOAD TRANSLATES ITSELF INTO MORE THAN 180 CALENDAR DAYS FROM THE TIME A CASE IS CERTIFIED AS READY FOR APPELLATE REVIEW AND A DECISION IS ENTERED. SINCE THIS IS AN AVERAGE TIME, OBVIOUSLY WHILE SOME CASES WILL BE PROCESSED SOONER WHILE OTHERS WILL REMAIN PENDING FOR MORE THAN SIX MONTHS. THE LATEST INFORMATION AVAILABLE TO US INDICATES THAT MORE THAN A 180 DAYS IS REQUIRED TO PROCESS A CASE BEFORE IT CAN

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RECEIVE APPELLATE CONSIDERATION. THEREFORE, SHOULD A CLAIMANT RECEIVE AN UNFAVORABLE DETERMINATION BY THE VETERANS ADMINISTRATION, IT CONCEIVABLY COULD REQUIRE AT LEAST A YEAR BEFORE A FINAL DECISION IS ENTERED.

THIS LENGTH OF TIME, UNDER ANY STANDARD, IS UNACCEPTABLE. IT IS APPRECIATED THAT SOME DELAYS ARE UNAVOIDABLE. BUT UNLENGTHY PROCESSING TIME SHOULD BE THE EXCEPTION AND NOT THE RULE. FOR IN MANY INSTANCES WE ARE DEALING WITH CLAIMANTS WHO ARE DEPENDENT UPON SUCH BENEFITS, THE PAYMENT OF WHICH IS BEING DENIED THEM IN LONG PERIODS OF TIME. WE ARE OF THE OPINION THAT THE PROCESSING TIME PRESENTLY REQUIRED ADVERSELY AFFECTS DUE PROCESS.

BECAUSE OF THE CONSTRAINTS OF TIME, WE WILL ONLY BRIEFLY ADDRESS OURSELVES TO S. 349 AND REQUEST THAT OUR COMPLETE STATEMENT BE MADE A PART OF THE RECORD.

IN OUR OPINION TITLE 1, ADJUDICATION PROCEDURES, WOULD ONLY ADD TO THE PROCESSING TIME, AGGRAVATING AN EXISTING MOST SERIOUS CONDITION. AT THE SAME TIME, WE DO NOT FEEL THAT IT WOULD IMPROVE THE QUALITY OF THE END PRODUCT. THERE ARE ALSO A NUMBER OF PROVISIONS WHICH WOULD PROVIDE FOR PROCEDURES ALREADY IN EXISTENCE AND HENCE DO NOT REQUIRE ANY LEGISLATIVE ENACTMENT.

ON THE ISSUE OF JUDICIAL REVIEW, AMVETS OPPOSES ANY FORM OF JUDICIAL REVIEW OTHER THAN THAT WHICH WOULD ADDRESS ITSELF TO A REVIEW OF THE LEGALITY OF REGULATIONS AND THE CORRECTNESS OF LEGAL INTERPRETATIONS. IT IS FELT IN SOME QUARTERS THAT IN SPITE OF 38 U.S.C. 211(a) THE COURTS ARE ASSUMING JURISDICTION IN THIS AREA AND THEREFORE SUCH LEGISLATION IS NOT REQUIRED. WE ARE OF THE IMPRESSION, HOWEVER, THAT THIS IS NOT

(3)

UNIVERSALLY TRUE. SOME COURTS HAVE REFUSED TO ASSUME JURISDICTION BECAUSE OF SECTION 211(a). WE THEREFORE FEEL THAT SUCH LEGISLATION IS DESIRABLE IN ORDER TO ACHIEVE CONSISTENCY AND TO INSURE JUDICIAL REVIEW IN ALL CASES ON THE ISSUE OF POLICY AND THE LEGALITY OF CONTROLLING REGULATIONS.

AS REGARDS THE ISSUE OF ATTORNEY REPRESENTATION OF INDIVIDUALS WITH CLAIMS BEFORE THE VETERANS ADMINISTRATION, WITH OR WITHOUT CHANGES TO THE CURRENT PRECLUSION OF JUDICIAL REVIEW, IT IS OUR VIEW THAT THERE IS NO NEED FOR ATTORNEY REPRESENTATION DURING THE VARIOUS STAGES OF THE ADMINISTRATIVE PROCESSES INCLUDING APPELLATE REVIEW BY THE BOARD OF VETERANS APPEALS. OUR VETERAN POPULATION AND THEIR DEPENDENTS HAVE QUALIFIED EXPERT REPRESENTATIVES AVAILABLE TO THEM FURNISHED BY THE VARIOUS VETERANS SERVICE ORGANIZATIONS WITH NO COST TO THEM. FOR EXAMPLE, AMVETS, MAINTAINS AN APPEAL OFFICER WHO IS AN ATTORNEY AND A FORMER CHIEF MEMBER OF THE BOARD OF VETERANS APPEALS. WITH SUCH EXPERTISE AVAILABLE TO CLAIMANTS THERE IS NO NEED TO BURDEN THEM WITH ATTORNEY FEES PRIOR TO THE TIME THAT THE LEGAL SERVICES OF A PRIVATE ATTORNEY ARE NECESSARY SHOULD THE JUDICIAL COURSE BE PURSUED. HISTORICALLY, THE PRIMARY PURPOSE FOR THE FEE LIMITATION FOR ATTORNEYS WAS TO PROTECT THE MONETARY AWARD MADE TO THE VETERAN FROM UNNECESSARY PAYMENT OF FEES WHICH MIGHT HAVE AN ADVERSE ECONOMIC EFFECT UPON THE VETERAN AND HIS FAMILY. THIS CONCEPT IS ALSO TRUE TODAY. WE PREFER TO HAVE OUR VETERANS AND THEIR DEPENDENTS RETAIN AS MUCH OF THEIR BENEFITS AS POSSIBLE.

THIS CONCLUDES MY REMARKS AND I STAND READY TO RESPOND TO ANY QUESTIONS. THANK YOU.

(4)

As previously indicated, the case load and processing time is of paramount importance to the veterans. Testimony has been given in behalf of the Board of Veterans Appeals as to its current situation. This Committee has been furnished with data and it would serve no useful purpose for us to reiterate it. For the purposes of emphasis, however, we would like to dwell on several aspects of the work load and the processing time of the Board of Veterans Appeals.

For example, the length of time required to enter a final decision is being extended each year. Ten years ago, the processing time was 72 days. In fiscal year 1981 it was 183 calendar days. This fiscal year it is projected at 217 days. This means that a veteran or his dependent who has an appeal pending must wait 6 months or 7 months for a decision. That is, if he or she is fortunate, for the processing time referred to measured in calendar days is an average. Obviously, while some will receive a determination in less than average time, there are many who will wait a month or more after the average time has elapsed.

This is to say, that it is conceivable based on information that we are receiving, that an original claim which may require 8 or 9 months in adjudication may not culminate in a final decision by the Board of Veterans Appeals until the passage of 18 or more months.

In the judicial process, this length of time may not be considered as unreasonable. But we are not dealing with litigants. We are dealing with veterans and their dependents who believe that they have a valid claim for benefits with the Veterans Administration. And in many cases the claimant may be depending on the receipt of these

(5)

potential benefits. Therefore, time is of the essence.

The Board will decide approximately 35,000 appeals in the fiscal year. Of these, approximately 14 percent will be allowed. Translated, this means that approximately 5,000 beneficiaries who have established entitlement will have to wait near 18 months for the final adjudication of their claim. We respectfully submit that this waiting period is entirely too long and given the circumstances of its clientele it is unreasonable.

To reduce the processing time, obviously it would be helpful to increase the number of personnel. We are not convinced that this is the best or only solution. Improving the efficiency of the operation would be another method of striving to achieve this goal. And finally, in the administrative and procedural requirements as to the format of the decision which is published by the Board may provide means that could lead to the reduction of the processing time.

Regarding the latter proposal, it is not our intention to suggest any finite solutions. We believe that the subject needs to be studied and we offer as a suggestion only the possibility that in certain cases a fully rationalized decision setting forth the pertinent laws and regulations as well as findings of facts and conclusions of law may not be necessary. For example, the Board could issue a one-line decision refusing to accept jurisdiction on a question as to whether or not new and material evidence has been submitted which would warrant its further review of the case which may have already been adjudicated. We do not have statistics available to us as to the number of cases which are appealed annually to the Board (on which the Board has previously entered a decision) on the basis that new

(6)

and material evidence has been submitted thereby reopening the claim. Frequently, the same claim is reopened on numerous occasions. And generally, they do not merit a de novo recitation of the evidence, findings of facts and conclusions of law. To prepare a decision in these cases as though they were original appeals, is costly and time consuming and serves no useful purpose. For the appellant, has already been furnished in the original appellate decision denying the appeal a resume of the evidence and the reasons for the denial of his claim.

We suggest this as a possibility for study and we are confident that there are other areas which, if explored, might prove to be fruitful in improving the quality of decisions as well as reducing the processing time required. It is our view, that the personnel of the Board should be relieved of the pressures of the challenge posed by the processing of the great number of cases with which it is faced each year. Anything which would relieve this burden will undoubtedly result in a better finished product.

And in this connection, we would like to observe that the professional personnel of the board of Veterans Appeals who are engaged in the decision-making process should be satisfied of their decisional independence. For this reason, AMVLTS feel compel to comment upon the Merit Pay System under the Civil Service Reform Act of 1978 which places all Chief Members of the Board of Veterans Appeals within the purview of its definition of supervisor/manager.

In December of 1979, the Chief Members of the Board of Veterans Appeals were informed that their position would be included in the Merit Pay System under the Civil Service Reform Act of 1978 because

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they fell within the definition of supervisor/manager.

Most, if not all, Chief Members of the Board of Veterans Appeals felt that their inclusion into the Merit Pay System was unjustified. They felt that the term "supervisor" included those individuals who devoted a preponderance of their employment time to exercising such authority. They argue that even if in fact they performed some supervisory functions, their primary duties and responsibilities are to perform highly technical and specialized functions which consumes 95 percent or more of their time. Their supervisory duties, if they can be classified as such, are minor and incidental to their basic function which is to decide appeals.

These are but some of the legal arguments advanced against including the Chief Members into the Merit Pay System. Among some of the other arguments advanced by Chief Members of the Board of Veterans Appeals are quoted, in part, as follows:

"....However, there are additional common sense reasons which concern basic unfairness, inequality of treatment, and serious compromise of judicial independence:

"a. BVA Organization: The purpose of the Board of Veterans Appeals and the duty and responsibility of all Board Members is (1) to review appeals originating at the regional office level, (2) to decide whether a veteran (or other party) is or is not entitled to various VA benefits, and (3) to promulgate a written opinion explaining the decision

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and reasons therefor. (See 38 U.S.C. 4004) Except for insurance cases, decisions of the Board are final and are not subject to review by the courts. (See 38 U.S.C. 211(a)) All Board Members are either attorneys or physicians. The Chairman and Vice Chairman (both attorneys) elected to enter the Senior Executive Service. The other Board Members, including Chief Members, are GS-15's. Board Members are appointed by the Administrator with the approval of the President. (38 U.S.C. 4001) Last year over 34,000 cases were adjudicated by the BVA. In order to be able to accomplish this significant feat, the Board Membership is divided into 16 Board Sections. Each Board Section is composed of three Board Members: A Chief Member, who is an attorney, a Legal Member, and a Medical Member (or in the case of one section, an additional Legal Member). Each Section is expected to turn out at least 8 cases per working day. In practice, many Sections meet the goal; other Sections exceed the goal; and still other Sections do not reach the assigned goal. To assist the three Board Members in the task of meeting this goal, the Chairman or Vice Chairman assigns six or seven staff attorneys (ranging from GS-9 to GS-14) and a secretary to each Section. As will be explained in greater detail below, with respect to personnel assigned to each Section, the Chief Members functions as a Group Leader (as distinguished from a supervisor

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as defined by the Civil Service Reform Act).

"b. Basic Unfairness: As we understand it, Chief Members, for Merit Pay purposes, are to be evaluated on the basis of the number of cases produced by our respective Sections and by the quality of those decisions as determined by a single individual (selected by and responsible to the Chairman) based on that individual's random review of a small number of cases selected on the basis of claim number digits. We reject this system as inappropriate (See paragraph 5d below) and as inherently unfair. Section production and quality do not depend to any significant degree on a Chief Member's leadership ability, managerial acumen, legal expertise, or even willingness to work long and hard. Section production and quality, in very large measure, depend on the talents of the attorneys assigned to our respective Board Sections. As is the case in any large group, the talents of individual BVA staff attorneys with respect to speed, writing ability, and expertise in VA law and regulations vary considerably. Chief Members have no authority whatsoever to hire, assign, promote, reward, transfer, suspend, significantly discipline, etc., the attorneys or even the secretary assigned to our respective Sections. Even the cases the staff attorney are assigned and directed to work on and the jurisdiction of each Section are, for the most part, selected by

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a centralized authority outside the Section. Moreover, it cannot realistically be said that we have authority to "effectively recommend" the actions enumerated in the preceding two sentences. This is because the Chairman and Vice Chairman are under no obligation whatsoever to seek our advice prior to such decisions nor are they in any way required to give any weight at all to our requests or suggestions with respect thereto. In summary, too much authority is accruing to the Chairman and Vice Chairman under the Merit Pay System and this cannot help but compromise our decisional independence.

(See paragraph 5d below) The potential threat is clear and well understood! For example, the Chairman, for whatever reason, could arbitrarily assign less talented attorneys to a Board Section or change the Section's jurisdiction and then subsequently penalize the Chief Member financially when such actions adversely affect the Section production, or quality, or both. The unfairness of the situation is manifest; we are being subjected to evaluations based on factors (production and quality) over which we have little personal control at present. If we are forced to become a part of the Merit Pay System, we intend to file an additional grievance requesting significant changes in the internal operations of the Board of Veterans Appeals. If we are to be held financially accountable as supervisors, then fairness and equity

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dictate that we must have the authority to function as supervisors.

"c. Inequality of Treatment: It is true that Chief Members perform certain Group Leader functions such as approval of leave and preparation of quarterly evaluations of staff attorneys assigned to their Section. However, none of these functions comes within the parameters of the definition of supervisor as clearly set forth in the Civil Service Reform Act, and even these minor functions are closely circumscribed by oral and written instructions from the Chairman and Vice Chairman and the input of the Associate Member. Except for these minor functions, the duties and responsibilities of Board Membership are essentially the same for Chief Members, Legal Members, and Medical Members. In fact, the former Civil Service Commission specifically ruled that the additional duties performed by the Chief Members are insufficient to justify a difference in GS grade level. Under the Merit Pay System, we the Chief Members, will no longer receive with-grade step increases or quality step increases. (See 5 U.S.C. 5402(b) (4)) In addition, because of production and quality factors essentially beyond our personal control, we may also end up receiving less than full annual comparability adjustments and be ineligible for any bonuses under the Merit Pay System. At the very same time that this is happening to us, our two

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Board Member colleagues (who share our office, review and vote on the very same cases, and work with the same assigned staff attorneys) will continue to receive within-grade step increases and full annual comparability adjustment. This clear inequality of treatment is yet another aspect of the basic unfairness of the situation as discussed at some length in the preceding subparagraph.

"d. Judicial Independence: For many years, Administrative Law Judges (and their predecessor Hearing Examiners) have been exempted from the operations of the efficiency rating system. The applicable law provides that they are entitled to prescribed pay "independently of agency recommendations or ratings." (See 5 U.S.C. 5372) The Civil Service Reform Act continued the exemption and thus excluded Administrative Law Judges from the provisions of the Merit Pay System. This legislative history clearly shows the intent of Congress to insulate and protect the decisional independence of quasi-judicial officials. For the best interests of all concerned, it is more important that they be "independent" than "responsive." As we emphasized in our request for reconsideration, the Board's decisions (with minor exceptions) are not subject to the scrutiny of the courts as are those of Administrative Law Judges. (38 U.S.C. 211(a), 4004(a)) Therefore, we are entitled to the same or greater insulation, certainly not less. It

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is axiomatic that the power of financial reward or the withholding thereof carries with it an inherent capacity to exercise a very strong influence. We, the Chief Members, believe it is essential that the integrity of our adjudicative process be preserved through the exercise of unrestricted decisional independence. We are firmly convinced that the integrity of our highly prized and jealously guarded decisional independence will be greatly compromised by our inclusion in the Merit Pay System. Moreover, such obvious compromise cannot help but generate an adverse reaction in the Congress, among the Service Organizations, and among well informed veterans."

As regards the provisions of S. 349 which would provide for judicial review of decisions of the Administrator of Veterans Affairs, for many years, each new Session of Congress was greeted with bills proposing judicial review of Veterans Administration's decisions. Many hearings were held. The proposals ran the gambit from proposing the establishment of boards to the creation of special courts. Extensive hearings and studies have been conducted over the years but the bills never reached fruition.

While cogent reasons were advanced for providing for judicial review, the Congress for equally cogent reasons preferred to correct the administrative procedures in the adjudication of claims including deficiencies at the appellate level. Legislation was enacted requiring the originating agency to furnish the claimant with a Statement of the Case as a first step in the appellate process. The purpose was to

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inform the veteran of the pertinent evidence of record, the requirements of the law, and the laws and regulations governing entitlement as well as the reasons for the denial of the claim. And we think that the Congress has responded wisely. What administrative deficiencies existed were corrected through legislation. Only one area exists which cannot be legislatively resolved and that is the correctness of legal interpretations of the controlling laws and regulations. This has always been the prerogative of the judiciary; to interpret the law.

For this reason, AMVETS is in favor of a limited judicial review which would confer jurisdiction upon the courts to pass on the legality of the regulations and legal opinions promulgated by the Veterans Administration. Such would be completely compatible with the concepts of Administrative Law and the role of the judiciary in our constitutional process. In our view such a bill would be in the best interest of our veteran population. We realize that some courts have assumed jurisdiction in spite of Section 211(a), 38 U.S.C., which provides for the finality of the Administrator's decisions. The argument is then made that there is no need for legislation providing for judicial review. We do not find this to be universally true and such legislation would provide some judicial consistency.

As to the desirability of extending judicial review to include all adjudicatory actions on claims involving benefits administered by the Veterans Administration, we are unable to see any need for such action. Apart from the administrative costs and the burden which such would impose upon an already over-loaded court system, our principal preoccupation is how it may adversely affect our veterans.

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The concept that everyone should be entitled to his day in court is a principle deeply embedded and ingrained in our constitutional form of a government. It is an attractive, appealing image that one can readily embrace to his bosom. Yet, the realities are such that in the role of Administrative Law in our system of jurisprudence is expanding. The ever increasing demands and complexities involved in servicing a free people have grown as this nation grew.

In the past, AMVETS with other service organizations believed that judicial review would benefit our veterans and, therefore, advocated passage of such legislation. In our continuing appraisal to adjust to the changing times, we find that many modifications have occurred since we had taken that position. Congress has enacted legislation providing additional safeguards to insure the proper consideration of claims at both the originating and appellate levels. It required the regional office to furnish each denied claimant with a Statement of the Case setting forth the controlling laws and regulations and an explanation of the reason for the denial. The Board of Veterans Appeals was required henceforth to set forth in its decisions separately stated findings of fact and conclusions of law. In addition, Congress provided the Board with authority to go outside the Veterans Administration in medically complex cases to obtain an opinion from an Independent Medical Expert in addition to the medical expertise already available from the Chief Medical Director of the Veterans Administration. In addition, Congress itself has played an active role in overseeing the adjudicatory operations of the regional offices and Board's appellate decision making. In one to two of every five cases decided by the Board of Veterans Appeals a few years ago there was Congressional interest expressed. AMVETS is gratified

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to see Members of Congress take such an active interest in its veteran constituency.

We are somewhat concerned about the possible effect that a court decision may have upon reconsideration of prior decisions (based upon the evidence of record at the time of the decision) by the Board of Veterans Appeals. Each year upwards of a hundred cases are reconsidered by the Board, on its own motion or upon request, which the Board allows on reconsideration either on the basis of error or administratively. Under the court's doctrine of *res adjudicata*, a court decision not only precludes further consideration by the court but may also preclude the Board of Veterans Appeals, on which its decision would be binding, from reconsidering its decisions which is predicated on the evidence previously of record. We view any attempt to place a statutory limitation on the doctrine as inviting a variation of interpretations resulting in confusion and uncertainty.

We wonder, too, what impact a court's decision, being a precedent and binding upon the Board, would have upon the flexibility of the Board in other similar cases. We feel that the existing presence of such flexibility is desirable during the Board's deliberations when compassion and other extrinsic factors are considered in resolving any reasonable doubt which may exist in favor of the appellant. Granted discretions can be misused and lead to arbitrary action within certain frameworks, we are constrained to view the Board's flexibility in the light of its avowed purpose, that of serving the veteran and to allow every benefit to which there is entitlement as provided by the laws enacted by Congress.

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We view as a possibility that full judicial review may impair the role of the Veterans Administration as originally intended by Congress, namely that the Agency serves the veteran. We believe that Congress still holds to the view that the Veterans Administration's purpose is: "To care for him who shall have borne the battle and for his widow and for his orphan." The role of the Veterans Administration vis a vis the veteran has never been an adversary one. Judicial review would require the Veterans Administration to wear two mantles: One as the veteran's advocate and the other as an adversary once a legal suit is filed.

To conclude, AMVETS is in favor of legislation which would provide for limited judicial review as to the legality of regulations and the correctness of legal interpretations but we oppose any judicial review de novo or otherwise on the merits of the claim adjudicated by the Veterans Administration.

Senator CRANSTON. Our next witness is Gordon H. Mansfield, Associate Legislative Director, Paralyzed Veterans of America.

We welcome you to this hearing. Thank you for being with us. If you, too, can hold your verbal presentation to 5 minutes.

TESTIMONY OF GORDON H. MANSFIELD, ASSOCIATE LEGISLATIVE DIRECTOR, PARALYZED VETERANS OF AMERICA, ACCOMPANIED BY ABRAHAM SCHWARTZ, NATIONAL APPEALS OFFICER OF PVA

Mr. MANSFIELD. Mr. Chairman and members of the committee, I am Gordon H. Mansfield, associate legislative director of Paralyzed Veterans of America.

I am accompanied today by Mr. Abraham Schwartz, national appeals officer of PVA.

I request that the prepared testimony of Paralyzed Veterans of America be included in the record.

PVA would like to make clear its position of not wanting to see the present structure of the Veterans' Administration altered. Also, we desire that the VA continue its good working relationship with veterans' service officers of PVA and other congressionally chartered veterans service organizations.

The free-of-charge services provided by these organizations are essential for helping veterans with their claims and problems, and there is no reason to upset this resource.

As noted in my prepared testimony, PVA has found that most of the VA's personnel are conscientious, dedicated, and have the

claimant's well-being in mind. However, PVA has noted with concern a trend toward less experienced and therefore less knowledgeable personnel at levels of the VA adjudication process.

The understandable reasons for this trend are explained in the prepared testimony.

This situation is further exacerbated by the present work measurement system in use by the VA. Employees are not evaluated on success rates of claims processed, but rather a piece rate method is used which encourages quantity instead of successful resolution of claims.

This system seems to lead to increased numbers of appeals, and, therefore, delays and frustrations for veterans. Also, the combination of inexperience and emphasis on number of claims processed frequently causes misunderstanding by the veteran of what information he needs to provide to substantiate his claim.

Notification of action can be hurried and confusing to the veteran, thereby extending the adjudication process and increasing the number of appeals.

Illustrating this problem is PVA's national appeals office indicating that 50 percent or more of all cases remanded by the BVA result in subsequent allowances, either by the regional office while in remand status, or upon subsequent return to the BVA.

PVA's position is that the current VA adjudication process—no formal rules of evidence and no cross-examination of witnesses, both at the regional office and the BVA levels, generally works well for veteran claims.

PVA therefore opposes modifying that system. However, we feel that if a veterans service organization or an individual veteran concludes that a particular VA regulation exceeds the Administrator's authority, then either the organization or the veteran should have the right to file a suit in Federal court.

Such suit would result in a motion for declaratory or summary judgment in which the court would rule on the validity of the regulation in question.

Such a process would not flood the Federal courts but would only result in the Federal courts functioning in the manner intended by the Founding Fathers.

The courts would tell concerned parties what the law is without meddling with the complex questions of fact unique to VA benefit claims.

It is PVA's opinion that there should be judicial review of constitutional questions, of questions of law, and of regulations, in VA benefit matters.

As mentioned, the Board of Veterans' Appeals, the final appellate body within the VA, is bound by VA regulation, found in 38 U.S.C. section 404(c). Hence, when the BVA is confronted with the BVA regulation that may be inconsistent with congressional intent, it lacks the authority to overturn that regulation.

In that sense, the final VA appellate body is helpless in its resistance to VA regulations.

Besides providing the Board of Veterans' Appeals with interpretation concerning congressional intent of statutes, judicial review of questions of law should greatly help alleviate some of the prob-

lems we have seen arise in instances of the executive branch thwarting congressional intent.

The VA has had to defy congressional intent at times in order to comply with the guidelines established by the Office of Management and Budget.

Throughout the 96th Congress, the Committees on Veterans' Affairs stated to the VA Administrator and to the Director of OMB that some of their rulings had not conformed to congressional intent.

Yet, Congress appears at times to have some problem insuring that the VA properly implements its mandates.

PVA considers the provisions of S. 349 to be generally quite reasonable and adequate, should Congress decide that there is to be court review of individual veterans' claims. However, PVA requests this committee to consider certain aspects of the proposed legislation. We hope that it is made evident to VA adjudicative personnel that they are still bound to grant a veteran's claim so long as a reasonable doubt exists in his favor.

The new section 3007(b) of S. 349 proposes to maintain the policy of reasonable doubt and raise it to statutory status.

With regard to the burden of submitting evidence in justification of a claim, PVA feels that the VA must continue its obligation to assist in developing the claims for the veteran. The VA compiles and holds the claims files which contain the veteran's military service and military medical records in addition to VA medical and claims folders.

The veteran must rely almost entirely on the VA's records, and the VA must assume the greater part of the burden of proof. PVA believes that the claimant, who has always submitted evidence to support a claim, should continue to submit what it is within his control to provide.

Further, PVA believes that VA should be required to submit to the courts all the contents of an individual's file and the VA should not have the right to "provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence," as per section 4025 of the proposed legislation.

The reviewing courts need to consider all available evidence, and then it, not the VA, can determine the admissibility of the material.

PVA supports the provision to allow a claimant a new hearing before a panel of three VA adjudicatory personnel at the agency of original jurisdiction.

This procedure should reduce the VA's appellate workload. The proposed three-member panels, working at the local level, would be especially beneficial to catastrophically disabled veterans with mobility impairments.

PVA would like to stress that it does not want to see the area of veterans' claims become an open system of greed or of contention and strife, and certainly we want the veteran protected from exorbitant rates and abusive treatment by less scrupulous members of the legal profession.

We feel that S. 349 wisely recognizes the need for sufficient payment of counsel, but at the same time structures safeguard to prevent exploitation of claimants.

Especially favorable to the veteran is the proposed section where the court may allow the prevailing claimant reasonable attorney fees as part of the cost. Although S. 349 goes beyond the review of questions of law which PVA actively supports, PVA believes the legislative proposal is thorough, with many safeguards included to protect the individual veteran who seeks court review of his specific claim.

We recognize that the Veterans' Administration and the Board of Veterans' Appeals has served veterans admirably, and desire that this service to veterans continue.

PVA is grateful for the excellent working relationship which it and other veterans service organizations have with the VA and the Board of Veterans' Appeals.

We feel, however, the need for limited judicial review by the civil courts is justified.

That concludes my testimony, Senator.

Senator CRANSTON. Thank you very much.

[The prepared statement of Gordon H. Mansfield, associate legislative director, Paralyzed Veterans of America, follows:]



PREPARED STATEMENT OF
GORDON H. MANSFIELD, ASSOCIATE LEGISLATIVE DIRECTOR
PARALYZED VETERANS OF AMERICA
BEFORE THE
SENATE COMMITTEE ON VETERANS' AFFAIRS
CONCERNING
ADJUDICATION OF VA CLAIMS
AND
JUDICIAL REVIEW
JULY 15, 1981

Mr. Chairman and Members of the Committee, it is a privilege for me to appear today to present the views of Paralyzed Veterans of America concerning the adjudication of VA claims and possible judicial review by civil courts of decisions made by the Veterans Administration. PVA is a Congressionally chartered veterans' service organization. We, without charge, annually help thousands of veterans and their families process claims for VA benefits. We work for veterans by helping them develop their claims requests and by advising them of the likely outcome of a particular claim, based on the merits of the specific case. PVA has a very high rate of success in helping veterans in this manner.

Mr. Chairman, we have found, since our chartering by Congress in 1971, that most of the VA's personnel are conscientious and dedicated. They, as a rule,

clearly have the claimant's well-being in mind when they process his request for benefits or services. Likewise, we have full trust in and respect for the Board of Veterans Appeals (BVA) located in Washington, D.C. This body consists of highly competent professionals who seek to apply the laws of Title 38, United States Code, as expressed in VA regulations, in a fair and equitable manner.

PVA has noted with concern a trend towards less experienced and therefore less knowledgeable personnel at all levels of the VA adjudication process. We believe this to be the result of retirement or promotion of many of those individuals who formerly worked directly with adjudication of veterans claims at the initial or appeals level. This changeover in personnel has arisen because a large number of employees entered the VA system immediately after World War II, and they are now retiring. The natural result is that personnel filling these positions have less experience and knowledge of veterans claims. Additionally, their training periods may have been restricted due to increased caseloads and the need to have people in place quickly. The result for the veteran is the probability of more mistakes, errors, or omissions in the processing of claims. This results in more time spent waiting for the claim to be corrected and processed.

The cutback to 15 BVA sections has apparently increased average processing time by approximately 10 days (from 126 days to 136 days) over the past year. PVA understands that for the current fiscal year the BVA plans on receiving approximately 35,000 cases but reaching decisions on only 32,000. Since there were, as of May 31, 1981, 5,224 cases ready for "call-up," and since the BVA only called up 2,700 cases in June, the Board will obviously fall further and further behind in its actual and potential backlog of cases.

Despite the traditional proficiency of the VA's processing of claims and the rulings made on them, and the continued concern for veterans' well-being, PVA fully supports amendment of Section 211(a) of Title 38, United States Code, to allow a limited form of judicial review of certain VA decisions and regulations. Let me state at the outset that we do not want to see the structure of the Veterans Administration altered. Presently it has within it a body, the BVA, which makes final determinations of law and fact and which is similar to bodies within other agencies. Such internal appellant bodies are necessary even if judicial review is present. Likewise, PVA desires that the VA continue its good working relationship with veterans' service officers. The free-of-charge services rendered by the veterans' service organizations are essential for helping veterans with their claims and problems, and there is no reason to upset this resource.

Granting judicial review for VA decisions is wholly, of course, within the power of Congress. Congress has often been tasked with creating both a new federal agency and its controlling statutes at the same time. In such situations Congress has had to predict, largely out of conjecture, what rules the agency is to apply and what laws will control the civil court review process. The situation surrounding the VA is much more structured and well defined. The Veterans Administration has been functioning smoothly for half a century and the Board of Veterans Appeals is already established with clearly defined functions. Congress, in granting judicial review, can either rely on the general provisions of the Administrative Procedure Act or can create a more specific controlling statute.

PVA supports judicial review of law but not of fact in cases involving veterans' claims. This controlling factor would greatly limit the court's workload for each

case presented to it. The BVA will already have prepared the record which will serve as the evidence in the case, since de novo review would not be allowed. We feel that the court should decide any given case on this record as a whole.

There is a growing body of court cases to justify the review of questions of law. Since a 1974 U.S. Supreme Court decision (Johnson v. Robison, 415 U.S. 361, 1974) the federal courts have heard cases dealing with the VA on constitutional issues. Going beyond this, some District Courts and Courts of Appeal have very recently begun to accept jurisdiction on the issues of whether the VA Administrator has exceeded his authority to promulgate regulations. In 1978, for example, the Sixth Circuit, while examining a VA regulation, refused to examine the facts but ruled on the law (Wayne State University v. Cleland, 590 F.2d 627, 1978). Similar decisions were resolved by the Eighth and Ninth Circuits in 1979 and 1980 (Merged Area X (Education) v. Cleland, 604 F.2d 1075, 1979; Evergreen State College v. Cleland, 621 F.2d 1002, 1980). While all these courts agree there will not be de novo review, they have ruled on the record as a whole. And, even though there is relatively little case law in the area of veterans' affairs, there is a marked trend of the federal courts accepting jurisdiction of those cases where a VA regulation was at issue.

Eight months ago the United States Court of Appeals for the District of Columbia decided that it, too, would not look beyond the record as prepared by the Veterans Administration (Middleton v. Cleland, No. 79-1843, Decided October 17, 1980). The generally liberal District of Columbia Circuit, in speaking of court review of the Administrator's authority to promulgate regulations, stated: "Suits challenging the authority would not open the floodgates to time-consuming litigation over the

merits of individual claims. Nor would they involve the courts in scrutinizing the day-to-day operations of the VA and second-guessing the Administrator on complex and technical questions."

Litigation arose in Middleton out of the very type of situation PVA sees as being harmful to veterans under the present lack of judicial review. The court probably would not have reviewed the case except for the presence of a constitutional issue (denial of due process and the creation of an irrebuttable presumption). In resolving this matter, the court had to examine the VA's implementation of a statute. Prior to the holding it was not clear to the applicant whether or not a decision by the Administrator of Veterans Affairs was a regulation or merely an administrative guideline promulgated for internal use by the VA in handling claims such as those in this case. The court admitted that, due to the historical lack of publication of regulations, it had some difficulty determining the difference between a VA guideline and a regulation having the force of law. Nevertheless, the court deferred to the Administrator's examination of the record and stated that his findings were "typical of the fact-specific questions that Congress left to the expertise of the Administrator." The court refused to go beyond the record for evidence, despite the fact that it had difficulty discerning the difference between a VA policy and a VA regulation.

In addition to reinforcing the Administrator's expertise in fact-finding, Middleton points out the need for judicial review of final VA decisions, because presently the VA is not formally bound in its rulemaking process. That is, there is no assurance that the VA follows Congressional intent when it makes a rule for implementation of statutes. PVA would not want to see the Administrator stripped of his authority

or discretion; however, veterans deserve to know that implementation of the law is in keeping with Congressional intent. Judicial review appears to be the appropriate way to assure that VA regulations are written in such a manner that they do not exceed the authority of the Administrator.

Besides providing the Board of Veterans Appeals with interpretation concerning Congressional intent of statutes, judicial review of questions of law should greatly help alleviate some of the problems we have seen arise in instances of the Executive Branch thwarting Congressional intent. The VA has had to defy Congressional intent at times in order to comply with guidelines established by the Office of Management and Budget. Throughout the 96th Congress the Committees on Veterans' Affairs stated to the VA Administrator and to the Director of OMB that some of their rulings have not conformed to Congressional intent. Yet, Congress appears at times to have some problem ensuring that the VA properly implements its mandates.

Legal scholars have repeatedly noted the importance of the federal agencies as the "Fourth Branch" of government, and many worry that even in the presence of Congressional control and judicial review, these agencies act secretively and are becoming the dominant and controlling force in the lives of millions of Americans. There are presently 30,000,000 Americans who are veterans, and their benefits and services are controlled by a virtually autonomous agency—which promulgates its own regulations, decides claims based on those regulations, and is immune from court review of interpretation of those regulations.

In 1895 the United States Supreme Court labeled programs such as veterans' benefits "privileges" and "gratuities" (Frisbie v. United States, 157 U.S. 160, 1895). In Lynch v. United States (292 U.S. 571, 1934) the Supreme Court again used the language of Frisbie and concluded that veterans had no vested legal or property right to benefits and services administered by the Veterans Administration. This understanding of veterans' benefits is incomprehensible to those of us who have suffered disabling wounds while serving the nation in combat or have given of ourselves maintaining the nation's vigilance in order to prevent combat from occurring. Furthermore, we certainly question the 1934 court interpretation that veterans' benefits are not a legal right but a "gratuity." As noted, federal courts have more recently begun to hear cases involving veterans' claims. It is an accepted rule, today, that once Congress creates benefits for any person or class of persons, those benefits can be denied only through due process. For example, Social Security claimants are permitted judicial review of final unfavorable agency action, largely out of the understanding that would-be recipients have contributed to the program and thereby have a property interest. In 1970 the Supreme Court also determined that welfare payments are not privileges or gratuities but are legally created benefits to which individuals are entitled if they qualify (Goldberg v. Kelly, 397 U.S. 254, 1970).

Should judicial review become a reality some Members of Congress may be concerned that there are insufficient funds appropriated for the number of eligible beneficiaries. The United States Supreme Court, while dealing with a case involving the Bureau of Indian Affairs, addressed this issue:

Thus if there were only enough funds appropriated to provide meaningfully for 10,000 needy Indian beneficiaries and the entire class of eligible beneficiaries numbered 20,000, it would be incumbent upon the BIA to develop an eligibility standard to deal with this problem, and the standard, if rational and proper, might leave some of the class otherwise encompassed by the appropriation without benefits. But in such a case the agency must, at a minimum, let the standard be generally known so as to assure that it is being applied consistently and so as to avoid both the reality and the appearance of arbitrary denial of benefits to potential beneficiaries. (Morton v. Ruiz, 415 U.S. 199, 1974)

This was not mere dictum by the court but is a summary of case law on the point of insufficient appropriations to provide for a designated group. Morton v. Ruiz dispels fears that the VA could be required to spend funds in excess of its appropriations. The court additionally gave a strong and favorable statement that when resources are limited, it is especially important that agencies make rules in an open environment and apply them fairly and evenly.

Mr. Chairman, it is PVA's opinion that there should be judicial review of constitutional questions, of questions of law and of regulations in VA benefits matters. As mentioned, the Board of Veterans Appeals, the final appellate body within the VA, is bound by VA regulations (38 U.S.C. 4004(c)). Hence, when the BVA is confronted with a VA regulation that may be inconsistent with Congressional intent, it lacks the authority to overturn that regulation. In that sense, the final VA appellate body is helpless in its resistance to VA regulations.

PVA's position is that the current VA adjudication process (no formal rules of evidence and no cross-examination of witnesses), both at the Regional Office and the BVA levels, generally works well for veteran claimants. PVA therefore opposes modifying that system. However, we feel that if a veterans' service organization or an individual veteran concludes that a particular VA regulation exceeds the Administrator's authority, that either the organization or the veteran should have the right to file a suit in federal court. Such suit would result in a motion for declaratory or summary judgment in which the court would rule on the validity of the regulation in question. Such a process would not flood the federal courts, but would only result in the federal courts functioning in the manner intended by the Founding Fathers. The courts would tell concerned parties what the law is without meddling with the complex questions of fact unique to VA benefit claims.

A review of questions of law and corresponding VA regulations is all that we seek in the possible amendment of Section 211(a) of Title 38, United States Code. If an individual applies for any benefit and does not establish a meritorious claim, we strongly support denial of the requested benefit, so long as the purpose and intent of the law have been followed and the individual has received due process. Furthermore, the existence of judicial review seems urgently needed if the Veterans Administration and its programs are not to be curtailed, dominated, or controlled by other federal agencies. (This latter factor seems to PVA to be at least as important as the individual veteran's right to have his day in court.)

PVA would like to take this opportunity to express our appreciation to the sponsors of S. 349, the proposed "Veterans' Administration Procedure and Judicial Review Act." The provisions of this bill include a review by the courts of veterans' claims.

PVA considers the provisions of S. 349 to be generally quite reasonable and adequate, should Congress decide that there is to be court review of individual veterans' claims.

Adjudicative procedures depend upon a formalized approach to handling veterans' appeals. However, Paralyzed Veterans of America must stress that there is not to be a reduction in the effectiveness of the more informal process that has developed around the veterans' service organizations. Presently there is a close, informal relationship between the service groups and the VA adjudicators at all levels, and this process cannot be disrupted. While all of the veterans' due process rights may not have been met in each and every case, one cannot deny that the service organization representation system has worked to the advantage of many veterans. Any system of judicial review must function as a complement to this quite effective, but less formally structured, system.

Closely related to the less structured system of appeals currently in use is the regulation that the veteran receives the benefit of the doubt in his claims appeal. We hope that it is made evident to VA adjudicative personnel that they are still bound by regulation (38 C.F.R. Section 3.102) to grant a veteran's claim so long as a reasonable doubt exists in his favor. The new Section 3007(b) of S. 349 proposes to maintain the policy of reasonable doubt and to raise it to statutory status.

Quite bothersome to PVA, though, would be the new law that the veteran in his pursuit of claim assumes the "burden of submitting evidence sufficient to justify a belief in a fair and impartial individual that the claim is well grounded." (Section 3007(a)). Certainly PVA agrees that the VA should be protected from veterans who

make fraudulent claims against it, and the American public should have to pay only for worthwhile and valid claims.

PVA feels that it must stress that the VA controls the greater part of evidence in the case of veterans' appeals. The VA compiles and holds the vitally important claims files. Therefore, in its procedural regulations, the VA must continue to recognize that it, not the individual veteran, has a great responsibility in bearing the burden of proof. S. 349 must not detract from the VA's time-honored obligation to assist in developing the claim for the veteran. This lack of development of the claim by the VA would not only shift the responsibility to the claimant but would also decrease the likelihood of proving the merits of the claim. Regardless of whether the claim is for service connection or increased benefits, the evidence is generally more accessible to the VA than to the average claimant.

More than in any other federal agency, the VA must share the responsibility for the burden of proof. After all, the VA receives the individual's military record and compiles his medical reports. Therefore, it is completely unreasonable to expect the veteran to assume the burden of proof for his claim equal to that of, for example, a Social Security pensioner. The person who applies for Social Security usually has independent physicians' reports, but the veteran must rely almost entirely on the VA's records, and the VA must assume the greater part of the burden of proof.

The claimant, of course, has always submitted evidence to support the claim and should continue to submit what is within his control to provide.

PVA is pleased to see that S. 349 maintains reasonable doubt standards according to 38 C.F.R. It is also understood and hoped for that the new Section 3007 of S. 349 will continue the presently equitable policy concerning the burden of proof.

Along with assuming the greater part of the burden of proof, the VA must be required by law to present to appellate courts the complete records and files of any claimant. The new Section 4010(b) states that so long as the appeals process is confined to the internal structure of the VA, the Administrator "may provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." In essence, the VA constitutes the court at this level and possesses the right to determine what evidence is admissible.

The new Section 4025(f) points out that when an appeals case moves into the District Court, the Administrator must present a "certified copy of the records upon which the findings of fact and decision complained of are based." The Judicial Review bill needs to state clearly and definitely that the VA is to submit to the courts all the contents of an individual's file and the VA, at this level of the appeals process, does not have the right to "provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." The reviewing court needs to consider all available evidence and then it, not the VA, can determine the admissibility of material.

The existence of veterans' right to judicial review must not be construed by the Veterans Administration, the service organizations, or the individual veteran as a cause (or justification) for contention and strife. Judicial review is to be a defined right with a delineated procedure, but it is to remain as only a last resort when

other informal and formal procedures have failed. PVA recognizes, though, that if veterans' right to judicial review becomes law the VA faces a new administrative problem. The demands that will fall on the VA to increase the quality of appeals procedures will slow down the administrative process, creating an even larger backlog of cases and thereby harming many needy veterans in their pursuit of benefits. Obviously, there will be a need for more personnel with better training to handle claims and adjudicate appeals.

PVA strongly supports the proposed Section 4001(c). This provision wisely foresees the need to constantly evaluate the VA's personnel levels, and the annual reporting on prevailing conditions and workload of the appeals board should help make the judicial review process function smoothly. Furthermore, the VA's responsiveness should minimize the number of cases going before the courts, and periodic readjustment of appeal board membership is necessary to maintain this responsiveness.

PVA would strongly oppose any effort to predetermine the permanent number of appeals personnel within the VA simply because the necessary size of such body could not be determined prior to implementing the proposed procedures.

Distribution of personnel is as important as is the number, and PVA appreciates and supports the proposal whereby the claimant can request a hearing before a panel of three VA employees whose primary responsibility is handling adjudicative functions. Conducting these hearings at the agency of original jurisdiction would be of importance to PVA's membership due to mobility impairments. Furthermore, this localized procedure should result in a measurable group of allowances and

thereby reduce the VA's appellate workload to some extent. The proposed three-member panels, working at the local level, would be beneficial to the VA and to individual veterans, especially the catastrophically disabled ones.

The proposed "Veterans' Administration Adjudication Procedure and Judicial Review Act" would do a great deal toward delineating the review procedure and toward establishing a fee structure that will ensure veterans of their right to legal counsel in cases reviewed by either the VA or the courts. PVA supports S. 349's rate structure for attorneys' fees. We recognize our function and duties as a veterans' service organization and stress that the various veterans' organizations must continue to do all within their power to assist claimants and to ensure that claims comply with the required procedures and regulations of Title 38, United States Code. However, there exists a number of reasons that some veterans may want to turn to independent attorneys in pursuit of their claims. The existing Section 3404, as the sponsors of S. 349 recognize, establishes an archaic rate structure for payment of attorneys' fees. Perhaps these rates were sufficient when they were determined, but today they are woefully inadequate.

In the cases where attorneys have represented veterans in appellate matters they have done so largely out of personal friendship with the claimant or out of civic duty. They have not, by and large, seen veterans' claims cases as a normal part of their legal practice. Some estimates show that where attorneys have handled veterans' claims, they have not been more successful in gaining benefits for the veteran than have the service organizations. There are at least two obvious reasons for this equal degree of effectiveness. First, service organizations have developed claims successfully. But, secondly, attorneys, as noted, have taken cases

out of personal friendship with the claimant or as a public service. As commendable as this is, it has not lead to a professional screening of cases' merits by members of the legal profession. Hence, attorneys frequently have had the least promising cases to handle.

PVA would like to stress that it does not want to see the area of veterans' claims become an open system of greed or of contention and strife, and certainly we want the veteran protected from exorbitant rates and abusive treatment by less scrupulous members of the legal profession. We feel that S. 349 wisely recognizes the need for sufficient payment of counsel but at the same time structures safeguards to prevent abusive exploitation of claimants.

The new Section 3404 would authorize a simple retainer fee of \$10 in cases where the veteran contracts with counsel but the latter's services are not needed because the matter is resolved by the VA prior to the attorney's preparing the case. If the attorney is needed, then the rate increases to \$500 or "25 percentum of the total amount of any past-due benefits awarded on the basis of the claim," whichever is lesser. In either case, the VA oversees the matter of payment and thereby helps to protect the claimant.

If the case moves out of the VA's jurisdiction to the courts then the court "may determine and approve as part of its judgment a reasonable fee for the representation of such claimant in action." Even where the court determines the amount, the VA still "shall direct payment of any attorney's fee that has been determined and approved." Furthermore, the Administrator's actions may then be reviewed by a court to determine if that action constituted an abuse of discretion.

Especially favorable to the veteran is the proposed Section 3404(i) where the "court, in its discretion, may allow the prevailing party, other than the Administrator, reasonable attorneys' fees as part of the costs." PVA assumes that only in very unusual cases will the courts require the Veterans Administration to pay court costs plus attorneys' fees, but this again is a protection for the veteran because it is only reasonable to expect the VA to award a claim that so obviously belongs to the veteran.

There may be attorneys who abuse the proposed pay structure, but S. 349 has a sufficient number of checks and balances inherent to it. The several systems of monitoring, determining, and awarding fees should reduce the likelihood of abuse, and the new payment structure should encourage members of the legal profession to provide more than token service to veterans.

In conclusion, Paralyzed Veterans of America supports limited judicial review for veterans' claims. While it is distasteful to dwell on the shortcomings of any proposed legislation, it is necessary that we identify problems we foresee arising from the nature of S. 349.

We fear that the VA will shift the burden of proof onto the shoulders of the claimant, an unreasonable action considering that the VA has access to the greater portion of supportive material in any claim case. Also, PVA worries that the VA's power to edit and reduce the proposed evidence could extend to appeals efforts that go beyond the VA itself and into the courts. The VA can evaluate evidence before it, but the courts must hold the authority to judge admissability of evidence brought before them.

We recognize that the Veterans Administration and the Board of Veterans Appeals have served veterans admirably, and PVA desires that this service to veterans continue. Furthermore, PVA is grateful for the excellent working relationship which it and other veterans' service organizations have with the VA and the Board of Veterans Appeals. There remains, however, the need for civil courts to review the VA's implementation of Congressional intent. Additionally, it is especially important that the courts review VA rules and regulations because the VA is so directly subjected to control by guidelines established by the Office of Management and Budget. Court review should help prevent the thwarting of Congressional intent which we have witnessed.

The United States Supreme Court stated in 1974 (Morton V. Ruiz) that court review is important during times of fiscal restraint, to ensure that regulations are promulgated "so as to avoid both the reality and the appearance of arbitrary denial of benefits to potential beneficiaries." PVA feels that the availability of court review of VA regulations, is especially important at this time.

S. 349 goes beyond the reviews of questions of law which PVA actively supports. However, the legislative proposal is thorough, with many safeguards included to protect the individual veteran who seeks court review of his specific claim. PVA considers S. 349 to be superior to S. 330 of the 96th Congress, with several shortcomings having been rectified.

When PVA supports limited judicial review, we are not attacking the VA's Board of Veterans Appeals. Rather, we seek to ensure that VA regulations reflect Congressional intent and that the VA be allowed to formulate its regulations in an

absence of duress being forced upon it by other federal agencies and offices of the Administration. It must be remembered that, in the few cases where federal courts have reviewed VA regulations, the courts have maintained great respect for the Administrator's authority and discretionary powers. PVA shares this respect and seeks to have the VA's viability and autonomy protected, and judicial review of law and regulations appears to be the most effective means of ensuring that the VA will continue to be of service to veterans.

Mr. Chairman, this concludes my statement, and I will be glad to answer any questions that I can.

Senator CRANSTON. Would the other three veterans organization witnesses please return to the table, and we have just a few questions to ask.

Gordon, at the outset, I want to note that I appreciate the problem you raise with S. 349 as to the question of who has the burden of proof.

As you know, the provisions of S. 349 on this issue are derived directly from current VA regs, and I will work to insure, as this legislation moves forward, that your concerns are fully dealt with.

First, on page 8 of your statement, you note that it is PVA's opinion that there should be judicial review of constitutional questions, of questions of law, and of regs, and VA benefits matters.

Does this extend to questions of law and regs that arise in individual benefits cases?

That is, would you support judicial review in an individual case where the claim has been denied by the BVA, and the veteran or survivors challenging the validity of the underlying statute or regulation?

Mr. MANSFIELD. That would be review of the law, yes, sir. Review of the constitutionality of the underlying regulation—yes, sir, I would.

Senator CRANSTON. If any other of you have a different comment to make, please add it as we go along. Would you support—

Mr. MANSFIELD. What—excuse me, sir.

Senator CRANSTON. Would you support some court review of the facts of the case not to determine the correctness of the decision, in any given case, but rather to insure that in certain cases, on the basis of all the evidence of record, the BVA's decision was not arbitrary or capricious?

Mr. MANSFIELD. A minute—we're getting into the area of the arbitrary and capriciousness. As far as—

Senator CRANSTON. Could you answer that for the record?

Mr. MANSFIELD. Sir?

Senator CRANSTON. Let me have the answer to that for the record.

Mr. MANSFIELD. Yes, sir.

[Subsequently, the Paralyzed Veterans of America submitted the following information:]

During the hearing you asked if PVA would support courts' reviews of the specific facts in a given case. I refer you to page 12 in which we state: "The reviewing court needs to consider all available evidence and then it, not the VA, can determine the admissibility of material." We fully anticipate that in many instances the courts will choose to examine the specific facts of a case before ruling on points of law, in an effort to ascertain how a claimant's case relates to the provision of law in question.

While PVA does not advocate review of facts surrounding veterans' claims, we support this type of review by the courts when they feel that such is necessary. This, therefore, is the basis of our request that the VA be required to provide the court with all of the contents of a veteran's case when he appeals to a court of law. It would be unjust to the courts for them to be required to make determinations in a vacuum apart from the necessary facts. And, omission of essential information would be an even more odious injustice to the particular veteran claimant.

Senator CRANSTON. Paul, Paul Egan. Do I understand from your testimony that you would not support judicial review even of matters involving the constitutionality of statutes or regs, the VA's authority to issue regs, or questions of law involved in the interpretation of title 38?

Mr. EGAN. Given the body of law that seems to have developed that would permit the courts to review the constitutionality of violations of somebody's due process rights, it would—I think we would have to say that we would agree.

Senator CRANSTON. You would not oppose that kind of a—

Mr. EGAN. Assuming that precedents have already been set that would permit that type of review, we agree with you.

Mr. SOMMER. Mr. Chairman, I'd like to add that—John Sommer of the American Legion—I believe it has already been pointed out in Mr. Coy's testimony and testimony of other individuals that the judicial review of constitutional questions is already taking place.

Our concern is that individual cases are not brought in and that they would be reviewed de novo by the Federal judge, which we fear is what would happen at such time that cases were brought before the judiciary.

Senator CRANSTON. Thank you. Don Schwab, let me address a question to you.

First of all, I note that I think you are absolutely right, as you suggest on page 11 of your statement, that my remarks at the time S. 349 was introduced on the attorney fee issue and whether to remove the \$10 limitation at the initial claims processing stage, wasn't intended to disparage veterans' service officers or their work representing veterans.

Mr. SCHWAB. That's true.

Senator CRANSTON. I believe most service officers do an excellent job, and I believe few veterans would be well advised to seek assistance from attorneys in proceedings before the VA, even if that option becomes available to them.

I also note that S. 349 would continue the \$10 limit for claims resolved at the initial claims level only because, in my view, the veterans' service officers do such an excellent job at that level, and that there is very little to—little reason to bring private attorneys into the process at that level.

In light of the VFW's current resolution of judicial review, does the VFW support the provisions of title III of S. 349?

Mr. SCHWAB. Yes, sir. Our position is that a veteran ought to have the right and should not be prevented from the right to go to Federal court. It seems strange that welfare recipients can avail themselves of court relief, whereas veterans are denied this same avenue of appeal.

Mr. CRANSTON. I'm impressed by the VFW's position on this, and I thank you for maintaining it.

Gabe, I don't have any questions for you at this time. I may have some questions for the record for any or all of you.

Yes?

Mr. SCHWARTZ. Senator, may I comment, if you will, on the burden of proof?

I am very much disturbed by the trend, by an attempt to lock into statutory concrete the necessity for placing the entire burden, and using that exact word, on the veteran.

My 35 years of experience, 30 in the VA and right up through 25 years on the Board of Veterans' Appeals and now 5 years as a service officer and a national appeals officer of PVA leads me to the conclusion that the prevailing system of helping the veteran and leaving the burden on the VA, particularly in the primary cases, in the initial claims, I think it has worked well and should continue to work, because the veteran has no way of getting the necessary evidence from the VA records and from the military records. That point has been well made.

I would merely like to point out the position taken by the VA itself, in a letter to you, Senator, in connection with S. 330, in the March letter, 1979, the attachments of a long letter from Administrator Cleland to you had two statements which I would like to quote. They are very brief.

"Veterans' Administration adjudicatory procedures are intended to be nonadversary in nature." I emphasize the following. "In almost all cases, a claimant need do nothing more than file his claim." One more sentence. "Adjudication of the claim can generally proceed without the necessity of the claimant appearing at a hearing, producing further evidence or presenting witnesses" et cetera. It seems to me that the present system whereby 38 C.F.R. provides that a veteran shall present evidence is sufficient without adding that extra term of burden of proof which regional office personnel, harassed as they are by the workloads and the pressures on them to get the cases out, will use that and automatically tell the veteran it's up to you to present new and material evidence and rarely in my experience are they telling him what the evidence is.

There's been a complete deterioration, over the years, due to the pressures that we're all aware of, of the personnel in the regional offices and adjudication.

And that is my point on burden of proof. Thank you, sir.

Senator CRANSTON. Thank you very much. I'm well aware of your concerns on this issue and I share them.

If any of you have any suggestions to make to us, specifically, as to revisions, to make sure we don't change that in any way while we're working on this legislation, please submit those thoughts to us in writing.

Mr. MANSFIELD. I believe PVA's position is included in the prepared testimony, sir.

Senator CRANSTON. Beg your pardon?

Mr. MANSFIELD. We are—PVA's position is presented in the prepared testimony.

Senator CRANSTON. Thank you all very much. We appreciate your help.

I'd like to call the next two witnesses together: Frederick Davis of committee on veterans, section of administrative law, American Bar Association; and Ronald Simon, staff attorney for the National Veterans Law Center, accompanied by Lewis M. Milford, staff attorney.

Mr. Davis, if you would proceed first, I'd appreciate it. And if each of you can hold your verbal statements to 5 minutes at the outset, please.

TESTIMONY OF FREDERICK DAVIS, PAST CHAIRMAN, COMMITTEE ON VETERANS SECTION OF ADMINISTRATIVE LAW, AMERICAN BAR ASSOCIATION, CURRENTLY VICE CHAIRMAN OF THE ASSOCIATION'S SPECIAL COMMITTEE ON VETERANS OF THE SECTION OF ADMINISTRATIVE LAW, AND DEAN, UNIVERSITY OF DAYTON SCHOOL OF LAW, DAYTON, OHIO

Dean DAVIS. Thank you, Senator. Senator Cranston and members of the Committee on Veterans' Affairs, I appreciate this opportunity to present the views of the American Bar Association on Senate bill 349.

My name is Fred Davis, and I am presently the vice chairman of the special committee on veterans of the section of administrative law of the American Bar Association.

For many years I was the chairman of that committee, as well.

I am presently the dean of the University of Dayton School of Law in Dayton, Ohio, and for 15 years I was Hinton professor of law at the University of Missouri, in Columbia, Mo.

In 1964, Senator, I published a lengthy and critical article on this subject, based upon 4 years of research. It was published in 39 Indiana Law Journal 183, 1964. In 1978 I prepared a special report and recommendation to the Administrative Conference of the United States dealing with the problem of judicial review of decisions of the Veterans' Administration.

Senate bill 349 deals with four specific subjects. The first subject concerns internal procedures of the VA and are matters with respect to which the American Bar Association has no particular position, although I will say that the provisions of the bill appear to be laudable and noncontroversial. The idea of experimenting with methods designed to speed up and expedite the processing of claims I think is all to the good.

The second subject with which the bill deals is rulemaking procedure, and the bill would require the Veterans' Administration to comply with section 553 of the Federal Administrative Procedure Act, which imposes "notice and comment" requirements among other things.

Basically, the purpose of section 553 is to give persons who may be affected by changes in administrative policy an opportunity to

know that something is coming along that may affect them, and to give them a chance to respond.

The idea is that the agency, before it can do something radical, has to publish its intention, and it permits persons to make written comments and to provide some feedback as to the desirability of the change. It's a relatively noncontroversial statutory provision.

Almost everyone agrees that it is good. VA representatives have said that this is unnecessary because the VA already voluntarily complies with it. Therefore, they say, it is redundant to make the requirement explicit.

I disagree vehemently with that position. The big problem in the courts with section 553 has been the failure of the agencies to comply with it on the ground that what they are issuing are not rules but simply statements of policy, the issuance of circulars, or some other policy expression, not a rule.

Unless compliance with section 553 is made mandatory, the Veterans' Administration will reserve the right to decide whether or not a particular policy expression is a rule or not. Without a mandatory requirement the VA is allowed to write its own exemption from section 553. And the American Bar Association has been in favor of extending section 553 to cover many areas which are presently exempted, so I feel certain that the American Bar Association fully supports this provision which would mandatorily subject the Veterans' Administration to the rather simple notice and comment requirements that are already applicable to most Federal agencies empowered to make rules.

With respect to the third subject of the bill—judicial review provisions—the American Bar Association has a long history of support for judicial review of administrative action. In the case of *Abbott Laboratories v. Gardner* the Supreme Court declared that judicial review is a cornerstone of American Government and that there is a presumption in favor of judicial review of administrative action. It's the only protection that the private sector has from illegitimate governmental actions adversely affecting it.

In 1958, the house of delegates adopted a resolution expressing its support of legislation which would permit limited judicial review of decisions of the Veterans' Administration.

In 1975, the house of delegates reaffirmed that position. All that is history. There's no question about the American Bar Association's support of the concept of judicial review.

One of the reasons for this is that the American Bar Association believes that there is no place in the American Government for a closed system. The Freedom of Information Act, the open meetings law, and the Federal Privacy Act all operate to permit the internal operations of our agencies to be subject, from time to time, to what might be called an external audit. Judicial review of allegedly illegitimate bureaucratic action is the ultimate remedy upon which all others depend.

When we say "judicial review" we are not talking about the courts undertaking to supervise the entire system of claims administration by the Veterans' Administration, or to second-guess every decision.

All that the American Bar Association is saying is this: When an individual can make a preliminary showing of substantial abuse of

his congressionally established status by the VA, he ought to be able to ventilate it in court in the same way that any other person has a chance to ventilate his claim that a Government agency has acted arbitrarily and capriciously. That's all we're asking for.

We seek no revision or any radical change in the administration of the VA's benefits programs. All we're saying is that there should be a limited opportunity for some judicial action on claims of egregious abuse.

And, as we see it, this is all that Senate bill presently calls for.

The difficulty with the present language of the law is that it immunizes arbitrary and capricious decisions of the VA from judicial review. The courts, unfortunately have had to go along with that. I have listed the decisions which have expressed impotence in the face of that statutory language in the study published in the *Indiana Law Journal*.

The American Bar Association also notes one very good thing about Senate bill No. 349. Namely, it effectively deals with the fears expressed frequently by members of the American Legion, for example, that if you allow judicial review of decisions of the Veterans' Administration somehow you're going to freeze the discretion of the VA and they will be paralyzed unable to grant claims because of positions taken by the court.

Nothing could be further from the truth. If a court upholds a VA denial of a claim, the claimant can file a new or amended claim with VA at any time. The existence of a judicial decision which had previously validated the denial of a claim would in no way affect the power of that claimant to reopen his claim based upon new facts and new circumstances. And there would be nothing to bar the VA from granting it.

Section 106(2) of the bill makes that very explicit, and I think you are to be congratulated for doing that.

Some years ago the ABA responded to a report which declared that if you opened up VA decisions to judicial review, there would be a flood of litigation and that the Federal courts would be subjected to a substantial increase in their work.

That report was based on a study that was done by then Assistant U.S. Attorney General Paul Nejelski.

In our report we listed some reasons why we thought the Nejelski projections were unrealistic, and they were based on the unique nature of the claims that are processed by the VA and the unique procedures followed.

The Nejelski projection was based upon the Social Security Administration's experience, and that's a totally different situation than what you have at the VA. Since this is all in our written testimony we needn't elaborate further at this point.

Finally, I would like to comment on the scope of judicial review established by Senate bill No. 349. This has been the subject of some critical comments here this morning and I would like to explain why the ABA favors it. The scope of review is really quite limited under chapter 72 of Senate bill No. 349. The criteria which the statute uses basically limits the court to rejecting a VA decision on the ground that it is arbitrary and capricious or otherwise unauthorized by law. There is no requirement that the court rejects a decision when it is not based upon substantial evidence.

The American Bar Association favors their approach so long as it is not interpreted to mean that the jurisdiction is limited only to questions of law.

The assumption that I've heard expressed here several times this morning is one that suggests that you can accurately allocate decisional responsibility between competing decisionmakers on the basis of whether the issue is one of law or fact. This assumption has been proven fallacious many times. Those characterizations just don't work. They sound fine in the abstract, but defining what is a question of law and what is a question of fact is something that is very difficult to do.

Basically, what you're always dealing with in judicial review is characterization. The statute uses a term. The next question is whether the given situation fits that term. It might be something as simple as dog. Dogs may be exempted from some rule applicable to other four-legged animals. A person comes in with an Australian dingo or a coyote, and the question arises whether that animal is a dog, and, further, whether that question is a question of fact or question of law?

The facts are that it has got hair, it has four legs, it's got eyes, et cetera. But whether it's a dog or not ultimately involves judgment.

To try to allocate these decisional responsibilities in terms of those characterizations has proved impossible. Therefore, I think Senate bill No. 349 wisely avoids using that discredited distinction.

The same problem arises in connection with the proposal that judicial review be limited to those situations in which it can be said that the Veterans' Administration decision has violated a constitutional interest or a constitutional right.

Deciding what is a constitutional question is also difficult. For example, you might take a decision in which the Board of Veterans' Appeals has denied or appears to have denied benefits on the basis of a person's race, on the basis of his religion, or on the basis of his exercising the privileges of freedom of speech. And you can say well, in that situation, that should be reviewed.

But suppose the denial is based upon some other consideration not within the first amendment specific protections. Are you going to say to those persons, even though the denials of benefits are not based upon the existence of some constitutional limitation, that they have to abide with an arbitrary and capricious decision?

I wouldn't think so.

Senator CRANSTON. Try to conclude in about 2 minutes.

Mr. DAVIS. OK.

Senator CRANSTON. What you're saying is very important, and very helpful. I have some questions.

Mr. DAVIS. Thank you, Senator, I think, except for the question of fees, that what I have said so far summarizes the position of the American Bar Association. Although we are concerned about how the formula for judicial review might be interpreted, we endorse Senate bill No. 349 for establishing judicial review.

On the question of fees, I think the written testimony adequately sets forth the ABA's position. Years ago I testified before the Tunney Committee on the Representation of Citizen Interests and pointed out the following situation which is still possible under the present law. An attorney would spend 100 hours on a veteran's

educational benefits claim and make a couple of trips to Washington in order to present the case and he wins, but he can only recover \$10. All right, that's the present situation. No matter what the expenses are, the most he can recover is \$10.

If, in fact, he charges more and the veteran pays it, the attorney is fined \$500 and sentenced to serve 2 years at hard labor in the penitentiary. That's 38 U.S.C. § 3405.

Now, I admit that the jails are not brimming over with attorneys who have violated that statutory provision. But it seems to me to be an example of a very archaic view about the legal profession today and the kinds of services that it can extend.

And, in conclusion, let me say that the thought that somehow or other attorneys are sitting out there panting and just waiting for the opportunity to zoom in and get all this VA business is wholly fallacious. The fact that over half of your social security disability claimants go before administrative law judges without representation indicates that attorneys do not recognize the rendering of such services as a kind of financial bonanza.

All Senate bill 349 does is to permit meritorious cases to be handled by attorneys in situations where they can extend some very definite and valuable services to the veteran.

I'll be glad to answer any questions, and I thank you for inviting me here.

Senator CRANSTON. Thank you very much. I appreciate your very constructive and helpful testimony.

[The prepared statement of Frederick Davis, past chairman, Committee on Veterans' Section of Administrative Law, follows:]

PREPARED STATEMENT OF FREDERICK DAVIS, PAST CHAIRMAN, COMMITTEE
ON VETERANS SECTION OF ADMINISTRATIVE LAW, AMERICAN BAR ASSO-
CIATION

Mr. Chairman, Members of the Committee, we appreciate this opportunity to present the views of the American Bar Association on S.349. I am Frederick Davis, Past Chairman and current vice-chairman of the Association's Committee on Veterans of the Section of Administrative Law.

The American Bar Association fully supports the basic principles of S.349: to remove the \$10.00 limitation on attorneys' fees, and to open up VA benefits decisions to judicial review.

Removal of Statutory Fee Limitation

The American Bar Association has been on record since 1957 as opposing statutory provisions concerning administrative action which place arbitrary limitations on fees for legal services to be rendered before administrative agencies.

Specifically on point, in August, 1977, the Association's House of Delegates adopted a resolution urging enactment of legislation: to repeal the limit of \$10.00 on the fee which an attorney may charge for representing a client before the Veterans Administration; and to provide reasonable fees for attorneys representing clients before the VA. (See Appendix A of this statement for a copy of the resolution.)

The VA administers a large and complicated system of benefits for veterans. (See Appendix B of this statement.) The system operates primarily through the mode of individual application, and informal administrative adjudication of disputed claims, without judicial review.

The ABA believes that a person should be permitted to retain an attorney to present his or her VA case if he or she so desires. It is beyond dispute that the current \$10.00

limitation effectively prohibits a veteran from retaining an attorney. The ABA believes that the availability of attorneys can play an important role in highlighting areas of vagueness and excessive discretion and in promoting effective presentation of complex claims, e.g., the "service-connection" cases.

A liberalization of the fee restriction is clearly crucial to ensure the availability of the attorneys needed to implement the judicial review section of S.349. If attorneys cannot afford to take VA cases because of the \$10.00 fee limitation, providing judicial review of VA decisions could become a nullity. Lay service organization representatives are prohibited from practicing in district court, and federal practice and procedures are far too complex for most lay veterans to effectively represent themselves.

S.349 does not require veterans to retain attorneys. It simply gives them freedom of choice. Specifically, claimants would be able to represent themselves, have a member of a service organization represent them, or hire an attorney.

Some opponents of the bill argue that attorneys would take advantage of veterans. To the contrary, in the complex cases, particularly the "service-connection" cases, an attorney who is trained and skilled in gathering and presenting inconclusive and complex evidence to an administrative agency, and building a record for possible appeal, may be the veteran's greatest asset. Moreover, every state has adopted a stringent code of professional conduct, similar to the ABA's Code of Professional Responsibility, which regulates the attorney in virtually every area of practice.

Establishment of Judicial Review

In 1958, the House of Delegates adopted a resolution expressing its support of legislation which would permit

Judicial review of decisions of the Veterans Administration (Appendix C). In 1975 the House of Delegates reaffirmed that position (Appendix D).

§211(a) of Title 38 of the United States Code presently pertinently provides that decisions of the Veterans Administration under any benefits program ". . . shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise." The effect of this statutory provision is to put the Veterans Administration above the law in the administration of its benefits programs and in the distribution of benefits authorized by Congress. Because the American Bar Association is committed to the proposition that no one should be beneath the law, it opposes this restriction. S.349 would change this and subject the decisions of the Veterans Administration to judicial review.

Such legislation also would reverse what the American Bar Association considers an ominous trend. Although ABA adopted a resolution in 1958 supporting legislation which would make VA decisions subject to judicial review, in 1970 a last minute amendment to a Veterans Administration appropriations bill further narrowed the reviewability of VA decisions. This change was made without notice or hearing for those persons adversely affected by the amendment. The amendment principally was prompted by the opinion of the United States Court of Appeals for the District of Columbia Circuit in Tracy v. Gleason, 379 F 2d 469 (D.C. Cir 1967), which construes the no-review clause as applying only to initial claims for benefits. In view of the regressive nature of this 1970 amendment the ABA was moved to reaffirm its position by adopting the 1975 resolution, once again expressing its support for legislation which would subject decisions of the VA to some judicial review.

The American Bar Association believes that there is no place in American government for a closed system. The Freedom

of Information Act and the Sunshine (Open Meetings) Law represent significant advances in assuring the American people that their governmental officials are complying with the law. To make the VA answerable in the courts to a legitimately based assertion of unlawful action on the part of the VA would be a similar advance.

Although most judges who have faced challenges to VA benefits decisions have given a literal effect to the no-review clause (see e.g., Hahn v. Gray, 203 F 2d 625, 626 (D.C. Cir 1953) "It was the purpose of that statute to remove the possibility of judicial relief even if the action of the Administrator was arbitrary and capricious. . .") Recent opinions have hinted that in a proper case involving an egregious interference with a constitutional right, the language might be disregarded. See Johnson v. Robison, 415 US 361, 368 (1974).

It is obvious, however, that our courts are inclined to avoid this constitutional issue if at all possible, and that a ruling on that issue would involve a direct conflict between what Congress has said and what the courts believe to be a constitutional limitation. Approval of S.349 or similar legislation would avoid such an unnecessary confrontation by making it clear that it was never the intention of Congress to put the VA above the law.

We note that §106(2) of S.349 effectively deals with one of the most frequently expressed fears of those who are skeptical about the value of judicial review -- namely, the fear that judicial decisions will destroy VA flexibility by establishing precedents which the VA is not free to disregard. That provision makes it clear that the VA is free to allow a claim even though its earlier disallowance is upheld on a judicial appeal.

One writer has predicted a dire impact upon the dockets of the Federal courts if review of VA decisions be allowed. A Deputy Assistant Attorney General, appearing before the Senate Veterans' Affairs Committee in the 95th Congress, 1st Session, in 1977, prophesied 4,600 appeals if the VA decision-making process were open to judicial review -- a total increase in cases filed in the Federal district courts of 3.4%.

The prediction is unrealistic.

1. The number of filings rarely is an accurate measure of drain. Many cases routinely are remanded or withdrawn because settled or for other reasons. Cases decided on the merits may be decided summarily, without trial and with lesser impact upon judicial manpower. J. Mashaw et al., Social Security Hearings and Appeals 127 (1978).

2. VA benefits decisions are not forged in the same trial-type crucible as Social Security benefits decisions, thus providing fewer technical or procedural grounds for judicial appeal. Social Security benefits decisions are subject to the trial type procedures of 5 USC §§ 556 and 557. Under S. 349 VA benefits decisions are specifically exempted.

3. Of the 23,000 claims rejected by the Board of Veterans Appeals, 20,000 are rejections of routine appeals made without a hearing. If the claimant did not think his case important enough to see a hearing before the VA board, it would not be likely he would retain counsel and go to court.

4. The typical VA rejected claim does not compare in severity to the typical Social Security rejected claim. In Social Security, the claimant's disability either prevents him from engaging in a gainful occupation or it does not -- he receives disability benefits or he does not. The vast majority of VA rejected claims involve upgrading of previously awarded percentage disability ratings. The veteran either

gets a little more money or he continues to receive the amount he has been receiving. The incentive to litigate in the courts is inevitably less.

In conclusion, the ABA fully supports the basic principles of S.349 to remove the existing \$10.00 limitation on attorneys' fees and to open VA decisions to judicial review.

On behalf of the American Bar Association we appreciate the opportunity to testify on this important piece of legislation.

We would be glad to answer any questions you may have.

Appendix A

Resolution of the
House of Delegates of the
American Bar Association, adopted August, 1977

Resolved, that the American Bar Association recommends that the Congress adopt legislation:

1. Repealing 38 U.S.C. 3404(c)(2), which limits the fee which an attorney may charge for representing a client before the Veterans Administration to \$10.00;
2. Providing reasonable fees for attorneys who represent clients before the Veterans Administration, based on the following considerations:
 - (a) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
 - (b) The likelihood, if apparent to the client, that the acceptance of the particular employment, would preclude other employment by the lawyer.
 - (c) The fee customarily charged in the locality for similar legal services.
 - (d) The amount involved and the results obtained.
 - (e) The time limitations imposed by the client or by the circumstances.
 - (f) The nature and length of the professional relationship with the client.
 - (g) The experience, reputation, and ability of the lawyer or lawyers performing the services.
3. Providing that the client and the attorney shall determine the attorneys' fee, subject to approval by the Administrator of the Veterans Administration and to review by the Federal district in which the claim is processed or in the Federal district court in Washington, D.C.
4. Nothing in this resolution shall be deemed to amend or modify Resolution #106(G), adopted by the House of Delegates in August, 1976.

EXERPT FROM THE
AMERICAN BAR ASSOCIATION
REPORT ON THE VETERANS ADMINISTRATION,
FEBRUARY, 1976

A pervasive problem in the Veterans Administration which attorneys could effectively monitor is the manner in which it determines who will and will not receive benefits. The problem is most critical in the exercise of the VA's discretion as to whether those with less than honorable discharges will receive veterans benefits. From 1964 to 1972, more than 175,000 servicemen were dismissed from the service with less than honorable discharges. Of the various discharges, bad conduct and dishonorable discharges were rare, accounting for no more than 1% of the total discharges. ("Types of Discharges Issued to Enlisted Personnel by Fiscal Year 1950-1972," Office of Assistant Secretary of Defense [Manpower and Reserve Affairs], Aug. 31, 1972.) Such discharges are imposed only by general or special courts-martial. The middle echelon of discharges is the undesirable discharge. Like the honorable and general discharges, it is administrative, but like bad conduct and dishonorable discharges, it may carry heavy penalties in civilian life. Undesirable discharges are given most often for drug use, homosexual acts, conviction by Civilian authorities, and offenses involving "moral turpitude."

Contrary to widespread belief, federal law does not bar the Veterans Administration from dispensing benefits to veterans with less than honorable discharges. The VA is in a position, for example, to extend educational assistance to veterans who, because of a lack of education or training, are perpetually unemployed. But because of the way the VA has applied the law, and the way it interprets its social functions, the agency has not made such assistance available.

Benefits are available by federal law to all veterans who receive discharges "under conditions other than dishonorable." Anyone who receives an honorable or general discharge is unambiguously entitled to benefits. Anyone who receives a dishonorable discharge is unambiguously excluded from benefits, as is someone issued a bad conduct discharge by a general court-martial. Undesirable discharges and bad conduct discharges issued by special courts-martial constitute the "gray area." If a veteran has one of these -- and more than six out of every seven Vietnam

veterans with less than honorable discharges do (38 USC 101 (2) -- the VA makes an independent determination of whether or not it was issued under dishonorable conditions. The agency has adopted its own rules on this question. A discharge issued for mutiny, spying, or homosexual acts is automatically considered to be under dishonorable conditions. In addition to the specific categories of discharges that the VA has determined to be under dishonorable conditions, the agency has adopted two rather broad and subjective criteria in its eligibility decisions. A discharge is considered to have been issued under dishonorable conditions if it stemmed from an offense involving "moral turpitude" or was the result of "persistent and willful misconduct." (Starr, The Discarded Army, at pp. 176-177). The determination is made on a case-by-case basis without the assistance of any published and definitive guidelines. The only guideline would appear to be an unwritten presumption that the service imposes less than honorable discharges only for acts of moral turpitude or persistent and willful misconduct, because the VA indicates that 93% of the veterans with less than honorable discharges who applied for educational benefits were denied them. (Letter from Mr. Stratton Appleman, Assistant Director Public Information Office, Veterans Administration, to Raymond Bonner, dated January 18, 1973.)

Ordinarily, the VA keeps no statistical records on benefit applications from veterans with undesirable and bad conduct discharges. A study of a five month period in 1972, however, noted that only 1,305 applications for educational benefits were received from men with less than honorable discharges. Of these, 91 were approved. During this same period, more than 4,000 veterans with less than honorable discharges applied for unemployment compensation (although the benefits are dispensed by the Labor Department, eligibility decisions are made by the VA). Of the 4,000 men who applied, 3,400 were found ineligible. Ninety-seven of the cases involved veterans with drug-related discharges; six of these were approved. (Starr, The Discarded Army, at p. 179).

The per se rules which the VA has adopted with respect to servicemen with less than honorable discharges appear to be a violation of congressional intent. Some argue that service organizations can adequately protect and represent those allegedly unfairly denied benefits because of less than honorable discharges. It would appear from the statistics herein mentioned, however, that the American Legion, the VFW and other service organizations have not been particularly effective in prosecuting such claims. This is an area ripe for the watchful eye of the attorney in assuring that congressional intent is implemented and those entitled to benefits are treated equally.

The VA's disability program is another area in which the attorney could be quite useful, since the considerable discretion involved in processing disability claims makes the program susceptible to unequal treatment among veterans. For example, a regulation provides that a veteran can be classified as totally disabled if he is "unemployable" and he achieves a certain percentage rating under a rating schedule (38 C.F.R. 4. 16017). The concept of "unemployability," however, as described in the regulations, is rather imprecise, sometimes resulting in a lack of uniformity in practical application. (The regulations define unemployability as "unable to secure or follow a substantial gainful occupation." 38 C.F.R. 4. 16.)

Similarly, in order for the veteran to participate in the disability compensation program, he must have at least a 60% disability on the rating schedule, or two disabilities totalling 70% with one equal to 40% (38 C.F.R. 4. 16). A determination of disability under the rating schedule requires many subjective determinations including the degree of social impairment due to psycho-neurotic disorders. Even in the disability cases where medical disputes predominate, subjective determinations must be made in arriving at the percentage of disability pursuant to the rating schedule, and without the assistance of a trained attorney a veteran may not be able to effectively guard against unequal treatment.

RESOLUTION OF THE HOUSE OF DELEGATES OF
THE AMERICAN BAR ASSOCIATION, ADOPTED 1958 ANNUAL MEETING

Be It Resolved, That the American Bar Association supports the enactment of H.R. 272, 85th Congress, First Session, a bill to permit judicial review of decisions of the Administrator of Veterans' Affairs, with a recommended amendment which would substitute review in the appropriate United States District Court for review in the appropriate Circuit Court of Appeals and that it authorize the Section of Administrative Law to appear before the committees of Congress and to take such other steps as it deems appropriate to carry out this resolution.

RESOLUTION OF THE HOUSE OF DELEGATES OF
THE AMERICAN BAR ASSOCIATION, ADOPTED AUGUST, 1975

Be It Resolved, That the American Bar Association reaffirms its endorsement of the principle of judicial review of the decisions of the Administrator of Veterans Affairs; and

Be It Further Resolved, That the President of the Association or his designee is hereby authorized publicly to urge enactment of this proposal of law.

Senator CRANSTON. Before questions, I'd like to ask Ron Simon now to proceed. And if you can be very brief, please, to give me time to ask questions.

I have to leave here shortly.

TESTIMONY OF RONALD SIMON AND LEWIS MILFORD, STAFF
ATTORNEYS, NATIONAL VETERANS LAW CENTER

Mr. SIMON. I'll try to be about 2 or 3 minutes.

Thank you for allowing us to testify, Senator. Mr. Milford and I testify really in three different capacities, as lawyers who represent veterans and veterans groups, as teachers of law at a law school in Washington, and also as people who have represented individual claimants in a variety of administrative agencies, in addition to those involving veterans.

The points I'd like to raise in my testimony put a gloss on four issues that I think have more or less clouded the discussion.

And the first one is—and I'm glad that we've begun the testimony today by many Senators recognizing it—that often a discussion of judicial review is hinged upon an effort to say what is wrong with the BVA and to find individual cases that are mistaken or processes that are incorrect.

I believe that that's a completely wrong way to conduct the argument. It doesn't properly describe the role of the judiciary in our Government and more unfortunately, I think, it puts people in a very mistaken posture. Those people that favor judicial review are seen to be opponents of the agency, opponents of the BVA, don't like the VA, have problems with it. Therefore, and even more unfortunately, people who feel that they want to support the BVA and work with it then oppose judicial review.

And our belief is that the prohibition against judicial review has been very destructive of the VA in the sense that we believe that judicial review will have the salutary effect of allowing people to raise and ventilate many of their disagreements. That is the role of the judiciary in our system. While I will not today mention any particular problems that a particular veteran has had at the VA, I do think that one can trace an overall sense of frustration that veterans have had frequently before this committee, and in the

press, to the fact that there is no ventilation through the judicial process.

A second problem that I think has affected this argument is the sense that if there is judicial review we will have a tremendous amount of unnecessary formality that will have a negative effect on the veteran. This is simply false. As I said in our written testimony, I've been before many other administrative agencies and they don't have this excessive formality. There's no requirement that the rules of evidence or *res judicata*, be applied. It's simply inaccurate to say that you couldn't have cases reopened, the statute allows for that. My own experience before at least 10 different administrative bodies simply does not bear out the fact that you get more formality when there's judicial review.

The BVA is no more or less formal than any of the other boards, including the Army Discharge Review Board or Social Security.

Now, a third argument that I think bears some concern is this idea that attorneys will somehow infect the whole BVA and VA process with a kind of extra formality. This is based on a bias that we all have against attorneys, which I have to say that I share to some extent.

As I wrote in my testimony, the BVA has 15 sections. Fourteen of the 15 have 2 of the 3 members being attorneys. The 15th has 3 of the 3 attorney members. I think it was testified today that the 7 to 9 staff attorneys in each section are the decision writers. So what the BVA is, without any doubt, is a process that is entirely monopolized by attorney decisionmakers, and the only people there that don't have attorneys are veterans.

I think it was also noted by one of the Senators this morning, that in title 38, United States Code, section 4004(c) says that the General Counsel's opinions will also control the VA. We again had another body of law and lawyers controlling the decisionmaking process where the veteran is the only person that's shut out of a lawyer by the effect of the statute.

The only other point I'd like to make is that in a long discussion this morning about various legal cases—*Demagno*, *Kirkhuff*—we heard the Veterans' Administration testify that they would not now perhaps take positions that were taken in those cases. There could be disagreements about what Jon Steinberg may think the case means, and what I think it means. Even my partner, Mr. Milford and I, when we both read a case, we often disagree.

But I think without regard to these disagreements about cases, a few points have to be made. There is no doubt that some few veterans have taken their cases to court. And I think under the current system, whether or not the courts are uniform, whether or not the VA will adhere to not raising as a defense 211, the one thing that is true is this: That only veterans who go to court are those who either have a relative who is a lawyer or have an independently wealthy friend who will represent them for free.

It is true that 211(a) has allowed in some courts for some exceptions and review some cases. We could debate what those are. But the fact of the matter is, these can only be raised by wealthy veterans that have some lawyer that will do it for free. The lawyer also must be one who is an expert in administrative law, because we've all studied those cases of those people in this room; we all

have disagreements about what they mean. Certainly the local lawyer who is not an expert cannot do this. So I feel that with regard to whatever those cases mean, it's highly discriminatory to your average veteran who is not going to be able to have a rich relative raise these highly technical claims.

Mr. Milford is here with me to answer any questions you might have about the scope of review or the current cases that are going on.

Thank you.

Senator CRANSTON. Thank you very much. Thanks for being so concise and direct and helpful.

[The prepared statement of Ronald Simon, staff attorney, National Veterans Law Center, follows:]

PREPARED STATEMENT OF RONALD SIMON, STAFF ATTORNEY, NATIONAL VETERANS LAW
CENTER, WASHINGTON, D.C.

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

Thank you for the opportunity to present the view of the National Veterans Law Center (NVLC) on whether there should be judicial review of Veterans Administration (VA) decisions on veterans' claims for benefits and services. Accompanying me is Lewis M. Milford, Esq., of the Center.

The Law Center is a strong advocate of judicial review. In taking this position, the Center reflects the views of the many individual veterans and veterans organizations which it represents. It is also the view of the Center's attorneys who, in addition to their representation of veterans, are on the faculty at the law school of American University and teach students, the public at large, and veterans organizations about the rights of veterans.

The Law Center is a part of the Public Interest Law Clinic of the Washington College of Law of the American University in Washington, D.C. The Center's law students represent veterans in hearings before the Washington Regional Office of the Veterans Administration (VA), the Board of Veterans Appeals (BVA), the

Discharge Review Boards and the Boards for the Correction of Military Records. NVLC attorneys also conduct training programs for veterans' advocates and are preparing a practice manual for VA practitioners.

Attorneys at the Center have tried courts-martial and administrative boards in every branch of the Armed Forces; appeared before all of the Discharge Review Boards (DRB), the Boards for the Correction of Military Records (BCMR), Courts of Military Review, and the Court of Military Appeals; and assisted veterans before the Board of Veterans Appeals, in the Court of Claims, the U.S. District Court, the United States Court of Appeals, and the U.S. Supreme Court. The Center has maintained a military and veterans' public interest law practice since 1970. Consequently, attorneys with the Center have had contact with approximately 5000 active duty military people seeking assistance, have been associated with attorneys who have presented several hundred DRB and BCMR cases, have been requested as counsel in approximately 1,000 more such cases, have had contact with approximately 600 attorneys or paralegals who have sought our advice on military or veterans' law matters, and we maintain close contact with more of those who specialize in similar matters.

Over the past nine years, we have had approximately 1,500 requests from veterans seeking an attorney for VA-related problems and have conducted forty seminars for veterans' counselors and lawyers. During the course of the latter, we have had occasion to discuss

veterans' matters with almost all lawyers and non-lawyers who assist veterans around the country. In 1978, David Addlestone, Esq., of the Center co-authored the Rights of Veterans, which has dramatically increased the flow of mail and calls from dissatisfied veterans to our office. We give advice on veterans matters to veterans advocates and lawyers around the country. Inquiries about veterans law are also answered in a weekly column in Stars and Stripes.

It is important to note that the experience and activities of members of the Center are not limited to military and veterans affairs. I personally have represented hundreds of clients at a variety of administrative tribunals including social security, SSI, food stamps, unemployment compensation, and public utility rate setting hearings. I have appealed cases from each of these bodies to court.

In addition to this wide base of practical experience in administrative law, Center attorneys teach, at American University law school, a variety of topics in administrative law including preparation for and conduct of administrative hearings and judicial review of administrative hearings.

Judicial Review

With this broad background in administrative law, veterans law, and vast number of appearances at the BVA, I begin my discussion by attempting to eliminate a number of false assumptions that have unnecessarily clouded the discussion about judicial review in the past. In the past, some people have begun the discussion about

judicial review by asking "what is so wrong with the VA and the BVA that judicial review is needed?". I submit to you that this is not the correct question. The United States has a Supreme Court which is a cornerstone of our democratic and constitutional society. There are also a multitude of other courts and tribunals that are below the Supreme Court and the decisions of which our Supreme Court may review. However, as we all are well aware, the existence of a Supreme Court does not imply the inadequacy, arbitrariness, or wrongness of the lower courts. Nor does the existence of the judicial system imply the wrongness or illegality of the other branches. The existence of the courts and legal system of which they are a part is merely the way in which disputes are resolved in our society.

My point, very simply, is that one need not point to errors, inadequacies, or other problems at the VA to argue for judicial review. The American system of government uses the judicial system to resolve disputes. My point is not made for purely academic interest. The fact is that premising the argument about judicial review on debates about VA problems or errors leads to a very serious confusion of the real issues. Tying the debate about judicial review to a discussion of VA flaws leads to the serious problem of denominating people who favor judicial review as critics or even opponents of the agency. In reaction to this first mistake, people who want to support the agency, in response to the perceived attack, automatically become opponents of judicial review. Thus, people who want to be "friends" of the agency believe they are obligated to

oppose judicial review. Unfortunately and unintentionally, these people become the worst enemies of the agency they are trying to protect. This happens because their efforts to prevent judicial scrutiny lead to the belief in the minds of the general public that there must be something the agency is trying to hide. Many veterans unfortunately believe that there must be something wrong with the VA because people have fought to prevent court review. This chain of reasoning is wrong at every step because it starts with a false premise and continues to build on it. Unfortunately, the prohibition against judicial review has led to a special status for the VA in the minds of veterans and the public. The product of the prohibition against judicial review is mistrust, suspicion and lack of confidence. The VA has been perceived as an agency beleaguered by criticism in the press and the media. Review by the courts would provide an explanation of decisionmaking and a ventilation of the frustrations of veterans. There can be no doubt that the prohibition against judicial review has had a negative impact on the image of an agency. Because the agency will necessarily deny the claims of some veterans, it is necessary to provide the opportunity for release of frustration that judicial review provides.

It is my contention that the equating "friend" of the agency to opponent of judicial review and proponent of judicial review to "enemy" of the agency is ill-advised, confused, and in the simplest of terms - wrong. The legal system is based on the idea that there are different viewpoints and ideas. Those of us who are lawyers know that as long as there are two lawyers there will be two different points of view. As a teacher of law I know that students

point out to me things I did not see in cases I have previously read and taught many times. Judges and courts reverse themselves. The law is a fluid process of ever-changing ideas, not an inflexible system where right and wrong remain the same. The endless change in the law reflects the changes in life itself and the variety of opinions that each human being has. Those of us who believe in a democratic and free society would want it no other way.

I apologize to the Committee for this rather high sounding civics lecture, but I have been quite disturbed by the trap we have fallen into that the argument about judicial review has to be based on a discussion of problems or errors in the agency. Rather, judicial review results in wider participation by skilled advocates raising different points of view. Judicial review represents participation, diversity and openness. This concept that review is based on differing opinions rather than negative criticism is clearly recognized by the VA system itself. The agency has liberal administrative appeal rights and opportunities for re-considerations. It also has a variety of review processes that can take place by Central Office staff before the case goes to the BVA. VA Manual M21-1 in the chapter on administrative reviews sets out these processes and allows in section .02 for advisory opinions and in section .06 for situations of differences of opinion. The VA administrative process is predicated on the acknowledgement that disagreements and changes of position are possible without anything being wrong with the system or the people in it. Judicial review is consistent with the VA system and its operations and one need not criticize, oppose, or change the VA for it to take place.

Our testimony represents the view of the thousands of veterans we have represented, taught and addressed at conferences. As an attorney who frequently speaks to large audiences about veterans issues and as a person who is called by lawyers around the country for legal advice about various veterans issues, I am struck by the surprise that these people express when they realize the effects of 38 U.S.C. § 211a. I have had the following conversation more times than I care to remember:

"Isn't it true that welfare and food stamp recipients can take their disagreements to court?"

"Isn't it true that courts get involved in who plays in Little League and the grades children receive in school?"

"Doesn't the Feres doctrine prevent veterans from suing the military?"

"Doesn't the combination of Feres and 211a close every legal avenue for veterans?"

"You know, I thought that veterans were both popular and powerful as a group, yet they have less rights than almost any group that you can name."

"By the way, do you know any other group so totally shut out of the judicial system?"

"Do you have any ideas on who's responsible for veterans' having fewer legal rights than other citizens and how this can be changed?"

Each time I have participated in this conversation, I have been impressed by the shock and dismay expressed by veterans, attorneys,

and public officials who were not aware of this situation. I have yet to encounter people who sincerely believe that the current law can be in any way defended.

Another argument against judicial review by those who continue to argue for the perpetuation of a system which gives veterans fewer rights than other citizens is the suggestion that judicial review will cause some great harm. But this harm is never made specific. I have heard that it would cause the loss of informality at the VA that allegedly benefits the veteran. One need not resort to theory, legal or otherwise, to undercut this argument. I have participated in administrative hearings before numerous administrative bodies. All of these bodies have their decisions reviewed by courts. The proceedings are in no way more formal or adversarial than those of the BVA. I have attended and represented people in social security, discharge review, utility rate setting, SSI, unemployment compensation and other hearings. None of them is more adversarial or formal even though the courts are permitted to review each of them. No specifics of how judicial review impacts negatively on this process have been offered. I have been to all of these hearings and have not seen a single instance of more formality or any other aspect which could hurt veterans. The aspects of informality at the BVA - namely, not following the rules of evidence and other technicalities are similar at the agencies which have judicial review.

As I said above, the Center is part of a clinical law school program at the American University law school in Washington, D.C. We are on the law school faculty and supervise law students who

represent veterans before the VA and various administrative agencies of the Defense Department. In the last three years we have represented hundreds of veterans before every federal administrative agency that decides disputes between veterans and the government.

In our work we are practically the only lawyers who regularly represent clients before these agencies. That unique kind of representation has given us some perspective on the nature of administrative agency decisions where clients do not have attorneys represent them. Most of our clients have been before these agencies without representation and come to us after losing their cases. This enables us and our students to see how a case can be handled by a lawyer and how a client without representation can be at a distinct disadvantage, even before a sympathetic agency. In fact, one of the principal aspects of the clinic course we teach addresses the issue of how a lawyer should develop a case before such an administrative agency.

With that background, we would like to address the ten dollar fee limitation and the barrier to lawyer representation, and the impact of attorney representation on the VA. We believe that giving a veteran the opportunity to pay a lawyer for representation before the VA will not only help the veteran but will improve the way decisions are made at the VA, as it has at other administrative agencies.

The Ten Dollar Fee Limitation

Apart from the merits of judicial review of VA decisions which we discuss elsewhere, we urge the Committee to take action to eliminate the ten dollar fee limitation. The limitation deprives veterans of a basic right that all citizens have, to seek professional

assistance they can afford to help them sort through a complicated legal system. They should have the opportunity to go into the marketplace and pay for the legal services they need, without the statutory barrier that lingers from another historical era and set of circumstances. There can be no doubt that the ten dollar fee limitation acts as an almost complete exclusion of lawyers. It is a perfect example of inappropriate and unnecessary government regulation to deny citizens of a free choice in the market place. Because of this indisputable effect of the fee limitation, I will refer to the policy in my testimony as a prohibition against veterans' getting attorneys, which is an accurate description. The retention of the limitation is usually justified by references to the negative effect lawyers would have on the VA. This is a matter with which we deal daily at the VA and it is indubitably false.

Some believe that removal of the fee limitation and introducing lawyers into the VA system would harm that agency's decisionmaking process. Arguments against such representation suggest that lawyers would unnecessarily complicate the process, create an adversary relationship between veterans and the VA and that simply suggesting the notion of lawyer representation before the VA is an indictment of current adjudication system.

Taking the last point first, to suggest that lawyers should be able to represent veterans who want lawyers before the VA does not mean that the current system is either unfair, indifferent or a failure. On the contrary, the right to choose a representative does not depend on any shortcomings of an adjudicative system. Rather, the right to seek legal assistance should stand alone as an

option for all veterans. The ten dollar fee limitation serves as a barrier to lawyers created by government regulation. Eliminating the prohibition would open the system to more free choice and a free market.

From our experience, we have found and sincerely believe that the introduction of lawyers and other legally trained professionals into the VA will improve the system. Our views are based not only on the results we have obtained in VA cases, but from the favorable comments BVA members have made about our work and the work of our law students. There are several specific benefits we have seen produced from our three year experience with the VA regional offices and the BVA.

The most important function lawyers can serve at the VA, as they have at other federal agencies, is that of mediator between the veterans and the agency. The typical lawyer who advocates before an administrative agency does not fit the stereotypical image of adversarial trial-type litigator, the image created by some who oppose lawyer participation at the VA. Persons familiar with federal agency practice know that the role of an administrative advocate is far different from a courtroom litigator. The administrative lawyer frequently acts to explain a complex agency to a client, attempts to clarify issues for both the client and the agency and tries to resolve claims with as little acrimony as possible. The reason why lawyers would function this way is obvious. It is not an adversary process. There is no attorney on the other side to argue against. The lawyer's task of clarifying issues deserves some further explanation because we believe that it has been the most important and most promising result we have seen at the VA.

In scores of cases we have presented to the BVA, the veteran either has not raised the proper issues or he/she raised the correct issue but in a way that did not clarify the argument. In these cases, we have been able to frame the issues carefully and succinctly to the VA and have been successful where the veteran previously had failed to obtain benefits. This is the result of having a legally trained professional sift through complex facts, review the relevant law and identify the issues. The result has been that we have been commended by the BVA for excellent representation, for simplifying their job and we have been thanked by veterans who understandably were unable to present their cases to VA personnel who are trained in the complexity of the system. Allowing lawyers to represent veterans would assist rather than complicate the process.

An even more pressing point against the argument that lawyers will somehow infect the system is to look at the BVA itself. The BVA has fifteen sections each with three members. Fourteen of the fifteen sections have two of the three members who are lawyers. In the fifteenth section all three members are lawyers. In addition, each section has seven or eight staff attorneys. In short, the entire decisionmaking process is monopolized by attorneys. Everything is done in legalistic terms. To argue that allowing the veteran to have a lawyer will infect the process with legalism ignores the reality of the process as it now exists. To send a person into a decisionmaking process that is so totally dominated by lawyers and to deny that person access to a lawyer is the consummate injustice. Recognizing the situation for what it is can only lead to the question of how this injustice has been allowed to continue.

We lawyers all have been trained to approach issues in a certain way and that method is used to adjudicate issues at all federal agencies and in the courts. To permit veterans to have paid legal representation would simply allow them to hire a professional to present their case in a way best understood by the decision-makers. We have been told that the presentation of briefs to the BVA, which we do in every case, has helped the members better understand the legal issues and the factual record. Given the incredible caseload at the BVA, the clarification of issues that an advocate can perform will assist the BVA and at the same time give the veteran informed access to the system.

There are two final results we see in representing veterans before the VA and both are beneficial to veterans and the agency. In many cases, where a veteran has been unsuccessful, we have simply reduced complicated arguments to a letter of brief and submitted that for consideration by the VA. The VA in these cases granted the cases without a hearing and without further delay once the issues were explained. The other result is common to all lawyer-client relationships, and that is when a lawyer advises a client that he or she does not have a meritorious case. That detached, professional assessment of the merits of veterans' claims is missing from the current adjudication system. We have found that providing a client with frank advice about the chances of success is welcomed by the client who never before knew the real merits of the case. This is not to say that disgruntled clients will not seek another, more favorably inclined lawyer but the point bears consideration.

In this way, lawyer participation could significantly reduce the caseload of the agency on grounds that are sound and in a way where a client has a sense that a full and fair consideration by an independent professional has been given the case.

We also strongly believe that veterans with professional legal representation are better informed citizens who are more satisfied with the VA system once their case has been decided. There is a definite sense of satisfaction we see in clients who know that their case has been fully explored and presented carefully before the BVA. Even those clients who lose after all this work feel that justice has been done. It is this sense of basic fairness that is the intangible benefit of judicial review and legal representation that is little discussed but which may be the most significant result. Both the participation of lawyers and judicial review will inevitably have the very salutary effect of having the disgruntled veteran see that his case has been fully explored in every possible forum. The ventilation provided by lawyer participation and judicial review will invariably raise public opinion about the VA which has been perceived as secretive and bumbling. The prohibition of judicial review and attorney representation has caused many of the problems of the agency's image because there is no release for frustrations. There can be no doubt that eliminating these barriers will provide a great boost to the agency's public image and self-esteem.

Scope of Review

The last issue we address is the scope of review a court should exercise over VA decisions. Some are concerned that judicial review of VA decisions would negatively affect the current informal

VA adjudication system. This argument usually has expressed itself as a debate over whether the factual "substantial evidence test" or the legal "arbitrary or capricious" standard for review should be used. We support the substantial evidence test scope of review, for simple reasons that I have not been given before.

One proposal is to limit the scope of judicial review to the review of questions of law, commonly known as the arbitrary and capricious standard. Proponents of this standard suggest that this type of review will prevent a court from substituting its judgment on factual questions for that of the VA. While the substantial evidence standard is sometimes considered to be somewhat broader than the arbitrary and capricious test, the former is itself a limited form of review. All that is required under this standard is that VA decisions be reasonable. See Consolo v. Federal Maritime Commission, 393 U.S. 706 (1966); Environmental Defense Fund, Inc. v. EPA, No. 79-1580 (D.C. Cir. Oct. 30, 1980). Since VA proceedings are non-adversarial, it is imperative that reasonableness in decisionmaking be required.

However, the basic reason we propose the substantial evidence standard is to avoid the creation of new problems for courts and the VA that would result from judicial review and in particular from an arbitrary and capricious type of review. Courts are familiar with the substantial evidence test, and it is used to review actions of other agencies not formally subject to the Administrative Procedure Act adjudication requirements. In reviewing VA decisions, this standard could be easily applied by the courts.

While there is a significant body of opinion that the substantial evidence test and the arbitrary and capricious test are in reality very much different ways to say the same thing about the judicial review of informal decisionmaking,^{*/} we feel that as a practical matter factual review is more manageable and would in the long run work to the benefit of more veterans. This becomes clear when one looks at how the average judge and the average small practice attorney face an individual veteran's case. Most small practitioners we meet or who call us are not terribly sophisticated in the sophistry of proving what is arbitrary and capricious much less the finer aspects of the review of agency decisions.

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In Aircraft Owners and Pilots Association v. Federal Aviation Administration, No. 77-1904 (D.C. Cir. May 17, 1979) the Court of Appeals for the District of Columbia Circuit said:

We note, however, that this court recently has ascribed to the view that the functional distinction between the substantial evidence and the arbitrary and capricious standards may be largely semantic in the limited class of cases involving challenges to the validity of factual findings made through informal proceedings. See Public Sys. v. Federal Energy Regulatory Comm., No. 76-1609, slip op. at 13-14 n.34 (D.C. Cir. Feb. 16, 1979); Pacific Legal Foundation v. Department of Transportation, No. 77-1797, slip op. at 10-11, n.35 (D.C. Cir. Feb. 1, 1979); American Public Gas Ass'n v. FPC, 567 F.2d 1016, 1028-29 (D.C. Cir. 1977), cert. denied, 435 U.S. 907 (1978). See also Paccar, Inc. v. National Highway Traffic Safety Administration, 573 F.2d 632, 636 (9th Cir.), cert. denied, 99 S. Ct. 94 (1978); National Nutritional Foods Ass'n v. Weinberger, 512 F.2d 688, 705 (2d Cir.) (Lumbard, J., concurring), cert. denied, 423 U.S. 927 (1975); Associated Indus. of New York State, Inc. v. Department of Labor, 487 F.2d 342, 349-50 (2d Cir. 1973) (Friendly, J.), cert. denied, 416 U.S. 942 (1974). Slip op. at 14, n.28.

In our view, the average attorney would have an easier time in analyzing facts within the framework of what evidence is substantial enough to support a factual finding. Hence, veterans would be more likely to find low price or pro bono assistance if highly honed skills of legal semantics are not required.

As a comment here, we would like to suggest that the arbitrary and capricious standard is so nebulous that it would lead to non-uniform decisionmaking and would probably permit judges to substitute their judgments for that of the BVA. With a more complicated legal standard of arbitrary and capricious review, the VA judicial review practice would be limited to those attorneys highly specialized in administrative law and the art of making questions of fact into questions of law. We feel that it would be undesirable to encourage the isolation of such a practice of law since veterans are fairly evenly distributed throughout the country and the administrative law attorneys are more likely to be found in large firms in big cities. The average practitioner doing a favor for a brother-in-law or a fellow veteran would thus be discouraged from trying to weave and dodge to turn a simple fact situation into a "denial of due process". These comments also are relevant to the suggestion that a special veterans or disability court be established in Washington, rather than vesting all federal courts with jurisdiction over VA claims. We are concerned that most veterans will be denied access to a Washington-based court for reasons of travel cost alone. No solution to this difficult problem has yet been proposed and we do not see how any such review could possibly benefit most veterans.

As a final comment about the review standard, we would like to emphasize what we see judicial review not to be. Some critics have suggested that judicial review of the VA means de novo review of VA actions, a review which would indeed substitute the judgment of courts for that of the VA. Judicial review of the VA would not be de novo review. The review would consist only of review of the administrative record developed at the regional office and Board of Veterans Appeals in the VA. The full record would then be reviewed by a court to determine whether the final agency decision comported with the appropriate standard for review. This would not be a trial type hearing where new evidence is submitted and new arguments presented. The review would be very limited. This limited review would ensure that courts do not substitute their judgment for that of the VA.

This problem of de novo review related to another misconception on the part of judicial review critics concerning exhaustion of administrative remedies. Some have said that the existing service officer system would be destroyed by judicial review because courts would intervene in agency actions before the BVA issued a final decision. This would, they believe, result in judicial interference with regional office decisionmaking and disrupt the scheme of service officer representation at that level. This result could never happen because the doctrine of exhaustion of administrative remedies would limit court action to review of final BVA decisions. Regional office decisions normally would never be subject to court review. See McGee v. United States, 402 U.S. 479 (1971); McKart v. United States, 395 U.S. 185 (1969); Meyers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938).

Senator CRANSTON. Dean Davis, I am aware of your long interest and involvement on this issue, and I'm glad you made this clear for the record.

I'd like to ask both you and Mr. Simon to answer the following questions: As you know, there's some question about what should be the appropriate scope of review in a bill providing for judicial review.

If judicial review is allowed, but the court's review is limited to questions of law, do you believe that this would have the effect of increasing litigation on the threshold question of whether the claimant was raising a factual or a legal issue?

Dean DAVIS. Well, Senator, I've already suggested that the distinction between so-called questions of law and questions of fact is a fallacious one; and therefore, that such a limitation would create ambiguity as to what the proper role of the court would be in reviewing a decision.

Judicial review formulas really cannot mechanically control how courts or how judges will react to this process. What the judicial review formula does is to give to the court a hint, if you will, as to the congressional expectations concerning the intensity with which they will review the administrative decision. And of course, if you say that the jurisdiction is limited only to questions of law, that would be definitely a suggestion or, at least, a signal that the intensity of the review should be reduced.

But it also is not a very helpful signal to the court because of its ambiguity. I think the provisions of the present bill—although being an academic I can think of ways in which they could be improved—make it quite clear to a court that it is not to conduct a review as intensive as it would, let us say, in social security disability appeals. And it's a clear indication that it's only in the case of an egregious, if I may use that overused word, or a clear abuse, or a clear defiance of the record, that the court should undertake to reverse or remand a VA decision.

Senator CRANSTON. Thank you very much. Mr. Simon?

Mr. MILFORD. Senator, limiting the scope of judicial review to questions of law would increase litigation. The reason is simple.

Precluding any review of fact issues, would carve out a new area of law. What would happen would be the court then would be required to interpret new and novel theories that lawyers would advance on how VA decisions that are made at the administrative level would then be law questions that should be renewed. This would mean a new standard or review, rather than having, which is the current standard, a substantial evidence review of facts, which courts are very familiar with. Courts now in social security areas, and in many other agency areas, are intimately familiar with weighing facts in a record and deciding whether a decision is supported by substantial evidence.

The other negative result of a limitation to questions of law would be that veterans again would have to get administrative law experts who would then translate what could be simple questions of fact under a substantial evidence review standard into arcane questions of law that would be reviewed if only questions of law are subject to review.

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Again, the veterans throughout this country, in small towns, in rural areas do not have access to administrative law experts that would be able to conduct that type of litigation. So it would have at least two negative results.

Senator CRANSTON. Thank you very much. Do you agree with that, Dean?

Dean DAVIS. I do not agree that the term "substantial evidence" should be used. What you have here are decisions which are not required by statute to be made on the record after an opportunity for an agency hearing. So there's no need to bring in the substantial evidence test which has a specific meaning in a specific context not relevant here. I do not mean to say that a court could not reject a VA decision which was not factually supported. But if one uses the substantial evidence test, one is telling the court that it must conduct a more intensive review than would otherwise be the case.

A good example of the distinction is provided by the function of the Comptroller of the Currency with respect to Federal bank charters. Technically a Federal court has power to reject the grant or denial of a Federal bank charter on the basis of factual deficiencies.

But it may not do so on the ground that the decision was not supported by substantial evidence. It may do so only on the ground that the decision is so totally inconsistent with the submissions made that it is arbitrary and capricious. And that is what the formula in Senate bill No. 349 provides. It says that judicial review must be limited and it is consistent with the expectations of the veterans groups that the courts should not be invited to come in here and monitor, too meticulously, the decisions of the BVA.

Senator CRANSTON. Jon Steinberg will ask you a question.

Mr. STEINBERG. Dean Davis, to clarify the Senator's question about whether you agree with Mr. Milford, he wasn't making reference to the question of what should be the scope of review as to which there might be a disagreement between you, but his assertion that eliminating review of questions of fact and limiting review to questions of law only would tend to create substantial litigation on the threshold question of jurisdiction, and second, impose additional requirements on potential claimants in having to get administrative law expert type of attorneys to represent.

Dean DAVIS. I think you're saying that my answer was not responsive, and perhaps I should plead guilty to that.

Senator CRANSTON. Yes, that's what he was saying. [Laughter.]

Dean DAVIS. I agree with him that if you use that distinction, that is, assume that review jurisdiction can be limited to questions of law you're inviting all sorts of litigation, because it doesn't take much for an attorney, or, for that matter any person who's been in law school for a year or so, to argue that a particular question is a question of law. It's a characterization issue. And that's an invitation to litigate whether the question falls into that preferred category.

Senator CRANSTON. The VA, in its testimony, notes that there is a growing body of case law that allows for judicial review of the constitutionality of underlying statutes and VA procedures, and of the VA's authority to issue specific regulations.

I'm going to have to ask Mr. Bill Brew to carry on at this point with some questions that relate to that and a few other matters, and also to handle the hearing for the final witnesses, Roger Bauer and the other members of the Board of Appeals.

I'm very sorry that I cannot remain for that, but I have to be elsewhere.

So Bill, you just carry on.

Mr. BREW. Thank you.

Senator CRANSTON. I am aware of the concerns that the chief members have of that Board, and we will take them into account and consider them very carefully. Thank you.

Mr. BREW. The question the Senator was going to ask follows on the statement in the VA's testimony about the emerging body of case law. Do you believe, in light of the emerging case law, that legislation clarifying the extent of the bar to review in section 211(a) is desirable or whether it's necessary.

Dean DAVIS. May I respond to that?

I've heard those arguments, Mr. Brew, advanced several times. And I think they can be disposed of with one example.

If a person who is subjected to what he considers to be an aggrievement by a regulation, can challenge that regulation, that's fine.

Suppose the regulation itself is relatively innocent, however, on its face. Suppose, for example, it undertakes to impose a disqualification based upon the existence in some situation of "a drug," or a "controlled substance." And let us assume that the VA decision says that a milk of magnesia tablet is a drug and therefore the regulation bars the person from seeking relief.

Under that rather extreme example it is clear that granting only the power to challenge a regulation does not offer opportunity for relief from the most aggrieving type of action, which is a misinterpretation and misapplication of a facially valid regulation. And those bureaucratic actions are the ones which frequently cause perceptions of injustice in our society. The fact that the regulations themselves have occasionally been found to be outside the statutory mandate and therefore judicially declared invalid is fine. But those decisions offer no relief from illegal misinterpretations or misapplications of legitimate regulations.

Mr. BREW. And you don't believe that the emerging case law in fact reaches that situation?

Dean DAVIS. No, I don't think so. I'm not familiar with the case that was cited, but apparently a court of the District of Columbia refused to permit a challenge to the application of a regulation on the theory that the skewed application indicated a defect in the regulation itself.

Mr. MILFORD. Bill, I think some legislative expression of intent in the area of 211 is necessary, for several reasons. Courts have addressed the scope of 211 principally because the agency has raised 211 as a defense to any litigation that concerns any area of VA action. The defense has been raised, and has been mentioned this morning, in questions of the proper procedures the agency has followed in promulgating regulations, the substantive scope of the regulations, in any other VA action that has nothing to do in fact with the merits of individual decisions.

What has happened is, which was a bit of a surprise this morning, is that the agency has said that it agrees with the developments in that area, to some extent. We are in litigation on two cases where the agency has taken the position that 211 bars court review of procedures that the agency should follow in public rule-making. The section in this bill that deals with rulemaking would dispose of the question.

However, some legislative direction in this area is necessary. The agency has changed its position several times on when it would raise 211 as a defense. And the law is clearly not settled, but rather it is an emerging body of law that would benefit from congressional direction. The courts are confused and litigants are confused and this confusion could be reduced with clear expressions from Congress as to the extremely narrow scope of section 211.

Mr. BREW. Do you think that the case-made exceptions to 211(a) would generally be applied by courts in situations that clearly involved an individual claim for benefits where the claimant had gone through to a BVA denial, but where it was clear that the underlying challenge was to the validity of the regulation? In other words, do you think that the case-made exceptions would reach that situation and that there wouldn't be any difficulty in getting jurisdiction?

Mr. MILFORD. Some direction would be necessary to identify for the courts the nature of the challenges that would be permitted with 211 and those that would not. In my review, courts have read section 211 as much broader than Congress intended, principally because the VA has argued for an extraordinarily broad reading of the provision to preclude more than review of individual decisions. I think some direction as to the Congress' intent, to the proper scope of 211, would assist the courts in making those determinations.

Mr. BREW. Ron, in the VFW testimony, they indicated their view that the provision in S. 349 which maintain the \$10 limit on attorneys' fees at the initial claims processing level is unwise. They base that position on the view that the assumption underlying this restriction—that that level of the process is relatively uncomplicated and that there's little need for the assistance of attorneys—is wrong. From the basis of your and the center's experience, would you agree that there is a role for an attorney at the initial claims level?

Mr. SIMON. Oh, absolutely. As a person who has both practiced in these areas and also teaches, the cases are generally—any lawyer will tell you the cases are not won on appeal; they're won on preparation at the first trial and then ultimately appeal is more and more unpredictable. So having the attorney below to get a case record clear I think would be needed. It's been our experience in cases while going through a lengthy record, we've been able to write a simple letter and get a decision changed, because of an ability to clarify things. Lawyers do have those skills. One underlying point of our testimony that one of the arguments used against judicial review that there's no need, because everyone's doing a good job. I think a better way to look at the problem is that we're not talking about a situation where people have free choice. We're

talking about absolute prohibition, which is what the \$10 fee works as, and really prevents people from going into the marketplace.

It may be true that in many cases attorneys aren't needed. It may be true that other people are good representatives. I'm not here to say that they're not. I'm saying that attorneys could provide a salutary effect, that the \$10 fee is an interference and unnatural and unfair interference with the marketplace, and people ought to have that choice.

And it is our belief that that would help, that it would help below, and certainly, I would just like to respond briefly to your last question, take a more pointed view.

We're all familiar with the cases, I've said. You are, Jon Steinberg is. There's been very few cases that have got any individual benefits that have even reached the court of appeals level. I do give advice to attorneys around the country who call me and say well, if I challenge on behalf of an individual veteran a regulation and not the actual benefit decision, can I be confident of winning. And I have to tell him no, you can't be confident of winning. There is not that much case law; it's not that clear; most of the circuits have never addressed the question.

So I feel that legislation is needed. Because we're talking about a very, very scanty number of cases here and I don't think at this point I could advise a local attorney to pursue it knowing that he or she would have a very good chance of winning and knowing that he or she could only invest a limited amount of time based on the fact that they're now doing it for free.

So I think the legislation is painfully needed.

Mr. MILFORD. If I could add one thing to that, Bill, on the participation of lawyers at the regional office level. And I think one benefit of that, and the benefit that may not occur if you do have a limitation at that level is that many cases, as Ron said, can be disposed of at that stage. You can have better preparation and better results for veterans at that stage.

And also you may have a situation where attorneys would refuse to take a meritorious case, at that level where that case has not previously gone through the system. So you may have a situation where those cases that are otherwise good cases would not be taken because there would be no compensation for work at the regional office level. And those are cases that could be disposed of at that stage. We're talking not only about reducing delay but also about reducing caseloads, perhaps, at that stage. And I think that's one benefit that has not been discussed. One thing that lawyers do, frequently, is to tell a client the client does not have a meritorious case. This may be for many clients the first time that an outside professional has looked at a case, and said you simply cannot proceed on this case. And that could be an advantage because frivolous cases would be reduced.

Dean DAVIS. May I just say something, Mr. Brew, that endorses what these gentlemen have said.

If you look at the decisions you will find that in the social security area a large number of cases remanded to the agency are cases in which the applicant has appeared pro se. Frequently, the record indicates that there was evidence favorable to the applicant which was not developed, and that the administrative law judge,

who has to wear three hats in those proceedings, was remiss in not pursuing or helping the claimant develop evidence which might have presented the case in a more favorable light to the claimant. Those are cases in which the claimant appears pro se. Thus, I think the statements made here are absolutely correct in saying that, in many cases, having an attorney at that presentation or intake level means that the case is more fully documented and that his particular skills of marshalling evidence and conducting investigations are available and efficiently employed. This avoids having the initial adjudication made on the basis of an inadequate record.

Mr. BREW. One question in that regard; in the VA system, with the double opportunity that a claimant gets at the regional office where first, there is the paper claim, and if the claimant is turned down, there is the chance to file the notice of disagreement, and at that point, receive a statement of the case. Would it be adequate if lawyers came in at that point, or do you believe attorneys should really come in from the very outset? When the individual has a back problem that he or she attributes to service, they should be free to go see a lawyer, is that your view?

Mr. MILFORD. We've had many cases where we have gone in at that earliest stage where a veteran had not been represented before, filed a letter, a simple brief with some supporting documents, and have won on the case. And it's disposed of the case at that stage.

I think it's a question of whether you're willing to sacrifice some time, perhaps some delay, in not having lawyers enter the system at that point and later on. It's a hard question, but I think lawyers at that stage can be helpful.

Mr. BREW. Let me note just two things in closing. First, that we will provide a copy of the agency report that just arrived this morning to both of you, and if you have the opportunity, if you could review it and provide comments on any specific points, most particularly on the agency's estimate of the increased caseloads and the increased costs that would go with the increased caseloads.

And the other thing I'd note is that there will be some further written questions to follow up on your testimony.

Thank you. I apologize for Senator Cranston having to leave.

And the final panel, Roger Bauer, chief member, Board of Veterans' Appeals; Daniel Bierman, chief member; and James Johnson, legal member.

Before you begin, if I can just again make a point that Senator Cranston made—of course your testimony was not only here on time but well in advance, and was widely distributed, and is already under active consideration. I think you can tell that from the questions that were already presented to both Mr. Coy and Mr. Shuman.

I regret that the Senator had to leave for another appointment. If you would please proceed. If you could identify yourself for the record, and where each of you are sitting, for the reporter.

**TESTIMONY OF ROGER K. BAUER AND DANIEL J. B. BIERMAN,
CHIEF MEMBERS, BOARD OF VETERANS' APPEALS, ACCOMPANIED BY JAMES U. JOHNSON, LEGAL MEMBER**

Mr. BAUER. Thank you, Mr. Brew. I am Roger Bauer, chief member, Board of Veterans' Appeals. On my right and your left is Mr. Daniel Bierman, chief member of the Board; and on my left, your right, is Mr. James Johnson, legal member of the Board.

I will make a statement several minutes in length, as will Mr. Bierman, in support of our formal comments on the status of the Board of Veterans' Appeals under the Civil Service Reform Act of 1978. At the conclusion of our remarks we will be available for questions. I would emphasize, on behalf of the chief members of the Board, that our request for legislative change to title 38, section 4001(b) is based on two primary points. First, that unless statutory relief is provided, chief members of the Board will be singled out for potential reductions in pay as compared to Board member colleagues, despite added responsibility.

Second, and more importantly, merit pay under Civil Service Reform violates the principle of decisional independence so necessary to the deliberation of a quasi-judicial body.

As to the first point, it is always in the past been considered an honor to serve as a chief member of the Board, and the position was sought without regard to the prospect of additional duties absent compatible compensation. Suffice it to say, the honor becomes a dubious one with the prospect of financial and managerial inequities under the Reform Act.

Our primary concern, however, is not just a self-serving pocket-book item. We feel obligated to come forward as public witnesses uniquely positioned to alert you as to the impropriety of including Board members under the Reform Act.

We believe the Board's decisional independence is jeopardized by provisions which allow persons peripheral to the decision process to impose financial rewards or punishments on some members, based on questionable standards of performance.

In our formal statement, we have assumed the need for decisional independence. But why is this so?

Certainly the potential for political mischief is obvious. Furthermore, even well-intentioned individuals may be tempted to improperly manipulate the Board as a forum to change or direct public policy, and thereby indirectly circumvent appropriate legislative or executive channels. It is a sound and generally accepted principle to insulate those who exercise judicial or quasi-judicial functions from external intrusion, so as to preclude them from being stampeded or seduced into unseemly decisions.

Our primary Board function is in determining who has access to Government moneys and services and in what amounts. Decision-making here is on a case-by-case basis, and to be fair must be unfettered by extraneous influences.

Even allowing the appearance of vulnerability to intermeddling will undermine public confidence in the integrity of the decision process. The public has been given to believe that we provide an appellate review independent of earlier adverse Veterans' Administration actions. Our review may not seem so impartial when the agency has substantial influence over the Board through standards

which could, at some time, be altered to reflect the whims of outside officials.

We believe the need for Board independence within the Veterans' Administration is well-supported for the reasons given, and by the statutory requirement that Board member appointments be approved by the President of the United States. This clearly reflects an intention to place the Board outside of the intra-agency dominance Civil Service Reform invites.

We are not substantive policymakers, and the responsiveness sought in that act is not appropriate here. Ours is not to create or enforce such policy, but to interpret it as it has been translated into law. From there we apply it to specific case facts. In doing so, our cases frequently draw front-page media attention—radiation, agent orange, and asbestos exposure; celebrity appellants; ex-prisoner of war claims—they've all caught the public eye.

In our decisions we have not pleased all, but we have, among other things, effectively served as a buffer between those advocating change and those setting policy, without embarrassing the Government or tainting the public dialog.

The Board members share a sincere respect for those officials currently designated to exercise the authority of which we are so wary. But the system as established will go beyond the incumbents. We support our current chairman and vice chairman, and the pre-Reform Act system, which in the past gave them the authority to manage a proud, productive Board. I think the testimony of many of the people here today bears that out.

In conclusion, we would add that we have exhausted our administrative remedies. We need a permanent legislative solution. And as a last resort, we come to you to seek your aid.

Thank you again for your consideration and willingness to hear our concerns.

Mr. BREW. Thank you, Mr. Bauer. Mr. Bierman?

Mr. BIERMAN. Thank you. I also wish to thank the committee for its generous invitation to permit us to express our views.

At the outset, I wish to echo the statement by my colleague concerning the fact that by law we are appointed to the Board with the approval of the President of the United States.

It is obvious that this statutory requirement was imposed primarily to preserve decisional independence of the Board members. It is our view that the Civil Service Reform Act, as it applies to the chief members of the BVA, compromises this decisional independence.

I submit that there is no really fair way the the performance of the chief members can be evaluated under the merit pay system. This is because they have no control whatsoever over the type of cases for which they have jurisdiction, the selection of their associates, or the staffing of their attorneys. Even their secretaries are chosen for them.

Further, they have no control over the awarding of benefits, such as promotions or quality increases. In addition, they have no authority to take disciplinary action in any meaningful way.

In regard to personnel in general, they are limited only to the making of recommendations.

As has been stated, the chief members will be evaluated on the basis of both the quantity and the quality of their decisions. In this regard, quantity has always been emphasized. Obviously, the quantity and quality of the decisions are dependent to a great extent upon the abilities of the personnel assigned to each section.

The very best managerial strategy, that which is designed to bring out the best performance of each individual, would fail in the face of the reality of a deficient individual.

For example, the assignment of one meticulous, but slow, legal or medical member to a section, will severely limit output. Likewise, the assignment of a slow, careless, or indifferent staff attorney to a section will have the same effect.

Whether by chance or by design, if deficient individuals are assigned to a certain section, that chief member will be at a significant disadvantage. The possibility for abuses in staffing in this regard is obvious.

Jurisdictional assignments, over which the chief members have no control, have had a startling effect on the performance of each of the Board's sections. In this regard, it is generally acknowledged that legal, that is, the nonmedical jurisdictions, are the most difficult and time-consuming, as compared to the medical.

Of the medical jurisdictions, claims involving ears, eyes, and teeth are generally considered to be easier than other types of medical claims, such as neurological.

In March 1981, the Board published a ranking of the sections for the calendar year of 1980 based on productivity, quality, and timeliness. Significantly, the first five places were won by sections each of whose jurisdictions included ears, eyes, and dental.

Even more significant is the fact that the last 6 rankings, 10 through 15, all included legal or nonmedical sections.

The highest ranking of a section that included a purely legal jurisdiction was only seventh place.

Under the pressures which may be imposed as a result of the merit pay system, certain chief members might very well succumb to the temptation to sign cases which may be deficient in one or more aspects. Such a member might also seek to remand a tedious case rather than handle it on its merits, because he would be credited with the same time value. If no reason for a remand is apparent, one could always manufacture a reason, such as a more up to date physical examination.

Other factors which would clearly affect performance include the number of attorneys assigned to each section, which is quite important, and their grade levels. I will explain later.

Finally, I wish to again thank the committee for the opportunity to express these views.

Mr. BREW. Thank you very much.

[The prepared statement of Roger K. Bauer and Daniel J. B. Bierman, chief members, Board of Veterans' Appeals; and James U. Johnson, legal member, follows:]

PREPARED STATEMENT OF ROGER K. BAUER AND DANIEL J.B. BIERMAN, CHIEF
MEMBERS, BOARD OF VETERANS APPEALS; AND JAMES U. JOHNSON, LEGAL
MEMBER

STATEMENT CONCERNING STATUS OF MEMBERS OF BOARD OF
VETERANS APPEALS UNDER CIVIL SERVICE REFORM ACT OF 1978

Mr. Chairman and Members of the Committee, we thank you for this opportunity to explain why we believe Title 38 should be amended to exempt members of the Board of Veterans Appeals from those provisions of the Civil Service Reform Act of 1978 which pertain to the Senior Executive Service and the Merit Pay and Performance Appraisal Systems. Basically, we are requesting to be restored to the status quo before the enactment of the Civil Service Reform Act. In order for us to do the very best job for the veterans we serve, it is extremely important that our decisional independence be carefully protected from all unnecessary encroachments.

Pursuant to the provisions of 38 U.S.C. 4001(b), the Chairman and Vice Chairman and Associate Members of the BVA are appointed by the Administrator with the approval of the President. All Board Members are either attorneys or physicians. Last year more than 34,000 cases were adjudicated by the BVA. In order to accomplish this task, the Board Membership is currently divided into 15 three-person Sections. Each Section consists of a Chief Member (who is an attorney), a Legal Member, and a Medical Member (or in the case of one Section, an additional Legal Member). The Chief Member presides at Hearings and performs certain staff and administrative functions. The Chief Member, Legal Member, and Medical Member have an equal voice and vote in deciding the cases assigned to their particular Section. To assist the three Board Members in each Section, the Chairman or Vice Chairman assigns seven or eight staff attorneys and a secretary. It is the goal of each Section to turn out forty cases a week. Sometimes this goal is not met, but usually it is met and sometimes exceeded.

In 1978, the Civil Service Reform Act was enacted. This law provides for the establishment of a Senior Executive Service and the Merit Pay and Performance Appraisal Systems. The Senior Executive Service includes those GS-16, 17, and 18's who perform important executive and managerial duties. The Merit Pay and Performance Appraisal Systems include those GS-13, 14, and 15's who meet the statutory definition of "supervisor" or "management official."

Prior to enactment of the Civil Service Reform Act, all Board Members were in the regular Civil Service. The Chairman was a GS-17, the Vice Chairman was a GS-16, and all Associate Members, including Chief Members, were GS-15's. After enactment of the Civil Service Reform Act, the Chairman and Vice Chairman's GS designation was withdrawn and they were

placed in the Senior Executive Service. The Chief Members continued as GS-15's, but were placed in the Merit Pay and Performance Appraisal Systems on the basis that some of their duties brought them within the statutory definition of "supervisor." The Legal Members and Medical Members continued as GS-15's in the regular Civil Service. In other words, the Board Membership is now divided among three separate pay systems.

The specific pay received by individuals in the Senior Executive Service and the Merit Pay System depends on the evaluations prepared by their supervisors. For example, Chief Members, for Merit Pay purposes, are to be evaluated on the basis of the number of cases produced by their respective Sections and by the quality of those decisions as determined by a single individual (selected by and responsible to the Chairman) based on that individual's random review of a small number of cases. We reject this system because it is both inappropriate and unfair.

It is inappropriate to have any Board Members in the Senior Executive Service or the Merit Pay and Performance Appraisal Systems because their basic duties clearly make them quasi-judicial officials, not senior executives or supervisors. Moreover, it is axiomatic that the power of financial reward or the withholding thereof carries with it an inherent capacity to exercise a very strong influence. Such influence is highly inappropriate when exercised over quasi-judicial officials such as Board Members (as distinguished from senior executives and supervisors).

The pay scheme represented by the Senior Executive Service and the Merit Pay System casts a subtle chill over the entire decisional process. It does not matter whether the subject is a group of veterans such as ex-POW's, or a group of cases such as forfeiture cases or radiation cases, or even the claim of an individual veteran, the problem is the same. Stated bluntly, it may not be in the financial interest of the Chairman or Vice Chairman to take adjudicative positions not favored by senior VA officials. Similarly, it may not be in the financial interest of individual Chief Members to take adjudicative positions not favored by the Chairman or Vice Chairman. These observations are made with all due respect to the current incumbents, but a system, once established, continues beyond the current incumbents.

In addition to being inappropriate, the Merit Pay System as applied to Chief Members is unfair. It is acknowledged that Chief Members have considerable added staff and administrative functions. However, the Legal and Medical Members are colleagues, not subordinates. Moreover,

Chief Members have only a diluted form of supervisory control over the staff attorneys assigned to their Section. Their basic duty is not supervising assigned personnel, but turning out sound, well reasoned decisions. Chief Members certainly fully support the concept of trying to turn out high quality decisions in large numbers. However, evaluating Chief Members on the basis of Section production and quality is unfair because Chief Members have only limited control over production and quality and because the system is subject to manipulation and abuse.

Chief Members have limited control over Section production and quality because they must work with their Legal and Medical colleagues and all three Section Members must rely heavily on the staff attorneys assigned to their Section. As is the case in any large group, the talents of individual BVA staff attorneys with respect to speed, writing ability, and expertise in VA law and regulations vary considerably. For this reason, the system is subject to manipulation and abuse. For example, the Chairman, for whatever reason, could arbitrarily assign less talented attorneys to a Board Section or change the Section's jurisdiction to a more difficult category of cases and then subsequently penalize the Chief Member financially when such actions adversely affect the Section's production, or quality, or both. Again, these observations are made with all due respect to the current incumbent.

Another aspect of the unfairness problem concerns possible pay differences between Chief Members and their Medical and Legal colleagues. Under the Merit Pay System, Chief Members no longer receive within-grade step increases or quality increases because that money goes into a "bonus pool." (See 5 U.S.C. 5402(b)(4)) In addition, because of production and quality factors over which they have limited control, they may end up not only being ineligible for any bonuses, but also actually receiving less than full annual comparability adjustments. At the very same time that this is happening to the Chief Member, his Legal and Medical colleagues will continue to receive within-grade step increases and full annual comparability adjustments. This is particularly unfair when one realizes that the Chief Member, the Legal Member and the Medical Member share the same office, review and vote on the very same cases, and work with the same assigned attorneys and yet Chief Members have considerable additional responsibility.

A final aspect of the unfairness problem has to do with the propriety of having "quality" determined by a single individual selected by the Chairman based on that individual's random review of a small number of cases. This individual has been designated Deputy Vice Chairman and he is assisted by two Senior Attorneys and a secretary. Decisions of

high quality is a concept supported by all Board Members. However, this particular method of evaluating quality is too subjective and does not have the full support of the Board Membership. The money and personnel involved might be better utilized on the line producing decisions, particularly in view of our large backlog.

We wish to emphasize that our efforts to resolve this matter short of congressional action have been unsuccessful. The Chief Members appealed to the Merit Systems Protection Board. Both on initial review and subsequent formal appeal, that Board ruled that it did not have jurisdiction to adjudicate the complaint. In addition, the Chief Members also filed and diligently pursued a lengthy formal grievance within the Veterans Administration itself. The Examiner appointed to conduct the inquiry concluded that Chief Members are subject to inclusion in the Merit Pay System because, at least in a narrow technical sense, they are "supervisors" as defined by the Civil Service Reform Act. Nevertheless, the Examiner did specifically recommend that, because of the Board's adjudicative functions and because of valid equitable arguments, appropriate steps should be undertaken to remove Chief Members from the Merit Pay System.

We are convinced that an amendment to Title 38, Section 4001(b) would provide the best and only permanent resolution of our concerns about decisional independence. Section 4001(b) provides that "Members of the Board (including the Chairman and Vice Chairman) shall be appointed by the Administrator with the approval of the President." We urge you to amend the Section by adding the following language: "and they shall be entitled to prescribed pay independent of agency recommendations or ratings." The language of the proposed amendment is taken from 5 U.S.C. 5372. The generalized language of 5 U.S.C. 5372 has protected and safeguarded the decisional independence of Administrative Law Judges for many years. We submit that as a matter of common sense (without any need to resort to complicated legal arguments) it is clearly desirable and appropriate that Board Members have at least as much insulation and protection as Administrative Law Judges.

We have consulted with many people about our proposed amendment to give Board Members decisional independence similar to that enjoyed by Administrative Law Judges. Most people found the amendment to be highly appropriate, but a few individuals expressed reservations. They fear the Chairman would be left without sufficient supervisory control, that there would be much less decisional uniformity among the Board Sections, and that the already large backlog of cases would increase if Board Members took advantage of their independence to work slower or

to "retire on the job." They emphasize that many people believe that the Social Security Appeals System is burdened by a lack of decisional uniformity and by a huge backlog of cases precisely because of the unfettered independence of Social Security Administrative Law Judges.

We believe these fears are unfounded. There are many positions throughout the federal establishment classified as Administrative Law Judges or analogous to ALJ's, including members of the Veterans Administration Contract Appeals Board (See 38 C.F.R. 1.772). Most of these judges are acknowledged to be doing a fine job. Similarly, we believe that members of the BVA are doing a good job now and would continue to do so without the Senior Executive Service and the Merit Pay System. It is true that the Social Security Administration is experiencing very difficult problems, but it would be an unwarranted overstatement to say that these problems are primarily caused by the decisional independence of their ALJ's. In any event, the Social Security situation is a special case and is not at all similar to the situation at the Board of Veterans Appeals.

For example, Social Security ALJ's are spread out across the country and work alone, whereas Board Members are all located in a single office building, work in panels of three, and are subject to peer and management influences as well as to very thorough congressional oversight, particularly concerning backlogs. All this would make it very difficult for a Board Member to become an obstructionist or to "retire on the job." Board Members have a long history of working very hard to keep the backlog under control. There is no reason to believe that the enactment of our proposed amendment would change this.

A very important distinction between the two systems is that Board Members are not strangers hired from a Civil Service Register, as is usually the case at Social Security. In order to insure that appointees to the Board are knowledgeable and thoroughly versed in the intricacies of Title 38, Administrators have usually relied to a very large degree on the recommendations of the Chairman. In most cases, the Chairman recommends a Senior Attorney from the BVA attorney staff, usually someone he has known, observed, and evaluated for eight or nine years or even longer. Our proposed amendment would not change any of this. We are sure that with or without our amendment the Chairman will continue to recommend only those individuals who he believes have the temperament and physical and mental capacity to handle a large volume of work in a reasonably expeditious manner.

In addition to recommending individuals to the Administrator for appointment to the Board, the Chairman has many other very significant supervisory powers over Board Members. He frequently exercises his authority to assign and reassign Board Members and staff attorneys among the various Board Sections. He determines and redetermines the jurisdiction (or category of cases) to be handled by each Section. Usually, individual cases are assigned to Sections on a random basis; however, whenever he wishes, the Chairman has full authority to direct the assignment of a specific case to a Section of his choice. No member of the BVA attorney staff may be hired, fired, promoted, given an award, reassigned, or significantly disciplined without the approval of the Chairman. Our proposed amendment would not change any of this. Whatever our amendment does, it clearly does not leave the Chairman without significant supervisory control.

Supervisory control by the Chairman also includes his authority to request advisory opinions from the General Counsel. Whenever a difference of opinion arises concerning the proper interpretation of a law or regulation, the matter can be easily resolved by requesting a formal opinion from the General Counsel. Pursuant to the provisions of 38 U.S.C. 4004(c), precedent opinions of the General Counsel are binding on the Board. Our proposed amendment would not change this. Therefore, there is no valid basis for the belief that our amendment might result in less decisional uniformity among the Board Sections.

In conclusion, we would like to point out that the implementation of our proposed amendment would not cost the taxpayers a penny. Moreover, it would provide a meaningful response to those critics who argue that claims submitted by veterans do not receive an adequate appellate review because the Board of Veterans Appeals is too closely controlled by the Veterans Administration.

Finally Mr. Chairman, in order to fully document our position, we request permission to introduce into the record the following items:

(1) letter of January 23, 1981, to Honorable Alan K. Simpson; (2) letter of October 23, 1980, to Honorable Ronald M. Mottl; (3) Chief Members' grievance petition dated February 21, 1980; (4) Statement of Support of Chief Members' grievance by Legal and Medical Members dated March 10, 1980; (5) Grievance Examiners Report dated June 27, 1980; and (6) BVA Chairman's letter to Merit Systems Protection Board dated May 8, 1980, wherein he stated he had no objection to Chief Members being exempted from Merit Pay.


ROGER K. BAUER


DANIEL J. B. BIERMAN

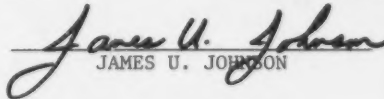

JAMES U. JOHNSON

EXHIBIT 1

January 23, 1981

Honorable Alan K. Simpson
Chairman, Veterans' Affairs Committee
United States Senate
Washington, D. C.

Dear Senator Simpson:

The purpose of this letter is to request an appointment with you (and/or appropriate staff members) at your earliest convenience to discuss the matters explained in some detail in the enclosed February 1980 grievance petition signed by Chief Members of the Board of Veterans Appeals. Pursuant to the provisions of the Civil Service Reform Act of 1978, the Chairman and Vice Chairman have been placed in the Senior Executive Service and the Chief Members have been placed in the Merit Pay and Performance Appraisal Systems. It is our firm conviction that Board Members are quasi-judicial officials—not supervisors, not senior executives. We very strongly believe that Board Members should be excluded from the Senior Executive Service and the Merit Pay and Performance Appraisal Systems for the following basic reasons:

Judicial Compromise: For the reasons set forth in paragraph five of our grievance, we believe our decisional independence has been greatly compromised. It is axiomatic that the power of financial reward or the withholding thereof carries with it an inherent capacity to exercise a very strong influence. Such influence is inappropriate in the case of quasi-judicial officials (as distinguished from supervisors or senior executives).

Congressional Intent: For the reasons set forth in paragraph four, and particularly subparagraph 5d, of our grievance, we question whether it was ever the intent of Congress to include quasi-judicial officials such as ourselves in the Senior Executive Service and the Merit Pay and Performance Appraisal Systems. We believe that adequate protection of our judicial independence requires that we be afforded at least as much insulation as Administrative Law Judges. (See subparagraph 5d of grievance).

Our efforts to resolve this matter administratively have been unsuccessful. The Examiner appointed to conduct an inquiry into the Chief Members' formal grievance concluded that Chief Members are subject to

inclusion in the Merit Pay System because, at least in a technical sense, they are "supervisors" as defined by the Civil Service Reform Act. Nevertheless, the Examiner did recommend that because of the Board's adjudicative functions and because of "valid equitable arguments" appropriate steps should be undertaken to provide an exclusion from the Merit Pay System for Chief Members. Thereafter, a reorganization of the Board was proposed. However, the plan was withdrawn when the great majority of the Board Members expressed serious reservations about certain features of the proposed reorganization.

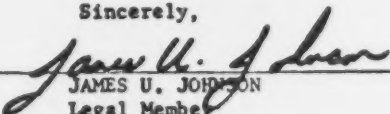
We are firmly convinced that an amendment to 38 U.S.C. 4001 would provide the best and most permanent resolution of our concerns about judicial independence. (See our enclosed letter of October 1980 to the Honorable Ronald M. Mottl). Specifically, we urge Sec. 4001(b) be amended in a manner similar to the following:

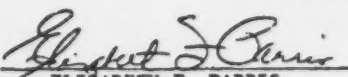
"Members of the Board (including the Chairman and Vice Chairman) shall be appointed by the Administrator with the approval of the President and they shall be entitled to prescribed pay independent of agency recommendations or ratings. (The language of the proposed amendment is underscored.)

One of us will be in touch with your secretary in the next few days. We hope you can find the time to meet with two or three of us. We sign as representatives of the great majority of all Board Members, including Chief Members, Legal Members, and Medical Members.


 DAVID T. LANDERS
 Chief Member
 389-2255

Sincerely,

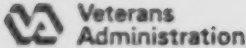

 JAMES U. JOHNSON
 Legal Member
 389-2238


 ELIZABETH F. PARRIS
 Chief Member
 389-3348

Enclosures:
 Chief Members' grievance
 letter to Cong. Mottl

EXHIBIT 2

Board of Veterans Appeals Washington, D.C. 20420



OCT 23 1980



Honorable Ronald M. Mottl
Chairman, Subcommittee on
Special Investigations
House Veterans' Affairs Committee
Washington, DC

Dear Mr. Chairman:

It is our understanding that, on November 13, 1980, your Subcommittee is scheduled to hold hearings on the question of judicial review. We, the undersigned Board Members, respectfully request that this letter be made a part of the official hearing record.

With or without judicial review, we urge that 38 U.S.C. 4001 be amended to make all Board Members analogous to Administrative Law Judges. Two current examples of succinct statutory language which would accomplish this goal are set forth in 5 U.S.C. 5372 and 41 U.S.C. 607(b)(1). It is our firm conviction that such an amendment is necessary to provide a permanent exemption from certain provisions of the Civil Service Reform Act (particularly the Merit Pay System and the Senior Executive Service) which we believe greatly compromise our decisional independence. Several of us have already discussed the question of decisional independence in some detail with committee staff members.

We further urge that, as a possible alternative to judicial review, serious consideration be given to establishing the Board as an independent appellate entity completely separate from the Veterans Administration with full statutory authority to rule on the legality of regulations and to dispose of due process questions.

Sincerely,

Enclosure:
Text of 5 U.S.C. 5372
and 41 U.S.C. 607(b)(1)

James H. Johnson

Guustave Z. Windsor M.D.

Robert K. Berman

Ernest B. Wright

Geo. J. Ward Richard K. Malenphy
 David B. Bismarck Walter V. Rice, Jr.
 Geo. G. Klepper, M.D. Eileen M. Krenzer
 Harold Sterling M.D. Charles G. Rono
 J. R. Brew M.D. Kenneth J. Della
 Elizabeth S. Davis James J. Butler
 E. Hubert Bowersfeld M.D. Bruce E. Hyman
 Charles E. Edwards, M.D. R.D. Whitley, M.D.
~~Carole Carole~~
 John J. Schale David W. Hender
 John S. Simmons Jr.
 Edward J. Graeger M.D.
 Clement M. Borden
 Gordon A. MacDonald
 Jacob J. Levinson
 H. Clayton Adams Ronald C. Priotto
 Jack W. Blasingame E.R. Stanford
 Donald H. Leeper, Jr. M.D.
 Thomas H. Wells, M.D.
 Walstead H. Clark

Administrative Law Judges
5 U.S.C. 5372

Administrative law judges appointed under section 3105 of this title are entitled to pay prescribed by the Office of Personnel Management independently of agency recommendations or ratings and in accordance with subchapter III of this chapter and chapter 51 of this title. (Underscoring added)

Contract Appeals Board
41 U.S.C. 607(b)(1)

The members of agency boards shall be selected and appointed to serve in the same manner as administrative law judges appointed pursuant to section 3105 of Title 5, with an additional requirement that such members shall have had not fewer than five years' experience in public contract law. Full-time members of agency boards serving as such on the effective date of this chapter shall be considered qualified. The chairman and vice chairman of each board shall be designated by the agency head from members so appointed. The chairman of each agency board shall receive compensation at a rate equal to that paid a GS-18 under the General Schedule contained in section 5332 of Title 5, the vice chairman shall receive compensation at a rate equal to that paid a GS-17 under such General Schedule, and all other members shall receive compensation at a rate equal to that paid a GS-16 under such General Schedule. Such positions shall be in addition to the number of positions which may be placed in GS-16, GS-17, and GS-18, of such General Schedule under existing law. (Underscoring added)

Enclosure

EXHIBIT 3

UNITED STATES GOVERNMENT

*Memorandum*DATE **FEB 21 1980**

TO Deputy Administrator, Veterans Administration (001)
 THRU: (1) Chairman, Board of Veterans Appeals (01)
 (2) Acting Administrator for PERSONNEL (05)
 FROM Chief Members, Board of Veterans Appeals

SUBJ: Formal Group Grievance; Merit Pay Coverage

1. Background: On December 18, 1979, the Chief Members, Board of Veterans Appeals, notified VA Personnel officials in writing that we intended to initiate grievance procedures and requested assistance. (See Tab A) On February 5, 1980, the Acting Assistant Administrator for Personnel replied. In pertinent part, he recommended that informal grievance procedure be initiated with the Chairman, Board of Veterans Appeals, and that thereafter, if still not satisfied, a formal grievance be forwarded to the Deputy Administrator, as the appropriate deciding official for this particular grievance. (See MP-5, Part I, Chapter 771, Section C, paragraph 4) We are following the suggested procedure.

2. Informal Grievance Procedure Completed: On February 13, 1980, all Chief Members, or their representatives, met with the Chairman, Board of Veterans Appeals. During the course of that meeting, the Merit Pay grievance was presented pursuant to informal procedure as required by MP-5, Part I, Chapter 771, Section C, Paragraph 6. Such presentation was made orally as authorized by Paragraph 5a. During the course of the same meeting, the Chairman responded that he was unable to provide the relief sought. The Chairman's answer and decision with respect to the informal grievance was made orally as authorized by Paragraph 5d.

3. Specific Action on Which Grievance is Based: On December 3, 1979, the Vice Chairman, Board of Veterans Appeals, advised Mr. G. Troiano as well as all other Chief Members in writing that his Chief Member position would be included in the Merit Pay System under the Civil Service Reform Act of 1978 because it met the definitions of supervisor/manager. (See Tab B) Thereafter, on December 6, 1979, all sixteen Chief Members requested the Chairman, Board of Veterans Appeals, to reconsider the decision that we be included in the Merit Pay System. (See Tab C) On December 18, 1979, G. Troiano received an undated memorandum signed by the Chairman wherein he affirmed the decision to include Chief Members in the Merit Pay System. (See Tab D) Because of the above-described reconsideration procedure, the usual time limit of 15 calendar days between the complained of action (December 3, 1979) and the filing of an informal grievance (February 13, 1980) is not applicable. (See INTERIM ISSUE 00-79-31, Paragraph D 8) Moreover, inclusion in the Merit Pay System constitutes a continuing condition subject to a grievance at any time. (See MP-5, Part I, Chapter 771, Section C, Paragraph 5b)



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VA FORM 2108
JAN 1977

4. Legal Reasons Why Inclusion of Chief Members in Merit Pay System is Unjustified: The Civil Service Reform Act of 1978 establishes a Merit Pay System based on a Performance Appraisal System which includes periodic appraisals of job performance. (See 5 U.S.C. 4302 and 5401) The Merit Pay System "shall apply to any supervisor or management official (as defined in paragraph (10) and (11) of Section 7103 of this title, respectively) who is in a position which is in GS-13, 14, or 15 of the General Schedule described in Section 5104 of this title." (Underscoring added)

a. Supervisor: The Chairman in his affirmation of the decision to include us in the Merit Pay System states that we come within the definition of supervisor "as set forth in Labor Management Relations Case Law." (See Tab D) We reject this argument as inappropriate. The cited case law is clearly inapplicable to our situation since it applies, for the most part, to union matters, such as eligibility to participate in a union election, etc. Moreover, there is no need whatsoever to look to case law or elsewhere because the Civil Service Reform Act itself defines supervisor as an individual "having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action." (See 5 U.S.C. 7103(a)(10)) Based on the way the BVA is organized and run, we simply do not come within the parameters of that congressionally mandated definition. (See paragraph 5b below for further elaboration.)

b. Additional Comments on "Supervisor": The definition of supervisor set forth in the preceding subparagraph includes the following final clause: "except that, with respect to any unit which includes firefighters or nurses, the term 'supervisor' includes only those individuals who devote a preponderance of their employment time to exercising such authority." (Underscoring added) Even if an arbitrary determination is made by competent authority that Chief Members do, in fact, perform some of the supervisory functions enumerated in the preceding subparagraph, we maintain that we still do not come within the meaning of the term "supervisor" as used in the Civil Service Reform Act. This is because our primary duties and responsibilities are to perform highly technical and specialized

- 3 -

functions; that such primary duties and responsibilities consume 95 per cent or more of our time; and that supervisory duties, if any, are minor and incidental to our basic function, i.e., deciding appeals. The above-quoted final clause of the definition of supervisor constitutes a clear signal of Congressional intent to exclude such persons as ourselves from the definition of supervisor.

c. Management Official: The Civil Service Reform Act defines management official as "an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency." (See 5 U.S.C. 7103(a)(11)) The Chairman in his affirmation of the decision to include us in the Merit Pay System states that, in our request for reconsideration, we cite several actions that we have the authority to take" which very effectively influence the policies of the Veterans Administration." (See Tabs C&D) At first glance this appears to be an appropriate retort; however, we reject that argument as inappropriate. Chief Members are quasi-judicial officials (as distinguished from management officials). All Board Members, including Chief Members, are fully bound by VA regulations, Administrator's Decisions, and precedent decisions of the General Counsel. (See 38 U.S.C. 4004(c)) In order to maintain judicial independence, it is firm policy that no Board Member participate in the formulation of changes in or additions to VA Regulations. Proposed changes or additions are not even routed to Board Members for comment. It is true, as stated in our request for reconsideration, that in connection with a specific appeal by a specific appellant a Board Section (as distinguished from a Chief Member), has authority to ignore or override the opinions and/or decisions of certain VA officials as reflected in various internal publications. Such a decision by a Board Section has absolutely no effect at all beyond the specific appellant involved; it does not change or cancel the policy. Nor can it be said that such decision may "influence" policy changes. In summary, it is incorrect to say that we, as Chief Members, are required or authorized to formulate, determine, or influence agency policies.

- 4 -

d. Professional Employees: In addition to the crystal clear language used to define supervisor and management official, the text of the Civil Service Reform Act contains additional persuasive evidence of intent with respect to inclusion in or exclusion from the Merit Pay System. The very same subchapter of the Act which defines supervisor and management official also defines Professional Employee as "an employee engaged in the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital...; requiring the consistent exercise of discretion and judgment in its performance; which is predominantly intellectual and varied in character; and which is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time." (See 5 U.S.C. 7103(a)(15)) We, the Chief Members, categorically deny that the duties and functions performed by Board Members, including Chief Members, extend beyond the parameters of the definition of professional employee. The intent of the Congress not to include such employees in the Merit Pay System is obvious and beyond argument.

5. Additional Reasons Why Inclusion of Chief Members in the Merit Pay System is Unjustified: The reasons for excluding Chief Members set forth in paragraph 4 above are technical and legal in nature. However, there are additional common sense reasons which concern basic unfairness, inequality of treatment, and serious compromise of judicial independence:

a. BVA Organization: The purpose of the Board of Veterans Appeals and the duty and responsibility of all Board Members is (1) to review appeals originating at the regional office level, (2) to decide whether a veteran (or other party) is or is not entitled to various VA benefits, and (3) to promulgate a written opinion explaining the decision and reasons therefor. (See 38 U.S.C. 4004) Except for insurance cases, decisions of the Board are final and are not subject to review by the courts. (See 38 U.S.C. 211(a)) All Board Members are either attorneys or physicians. The Chairman and Vice Chairman (both attorneys) elected to enter the Senior Executive

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Service. The other Board Members, including Chief Members, are GS-15's. Board Members are appointed by the Administrator with the approval of the President. (38 U.S.C. 4001) Last year over 34,000 cases were adjudicated by the BVA. In order to be able to accomplish this significant feat, the Board Membership is divided into 16 Board Sections. Each Board Section is composed of three Board Members: A Chief Member, who is an attorney, a Legal Member, and a Medical Member (or in the case of one section, an additional Legal Member). Each Section is expected to turn out at least 8 cases per working day. In practice, many Sections meet the goal; other Sections exceed the goal; and still other Sections do not reach the assigned goal. To assist the three Board Members in the task of meeting this goal, the Chairman or Vice Chairman assigns six or seven staff attorneys (ranging from GS-9 to GS-14) and a secretary to each Section. As will be explained in greater detail below, with respect to personnel assigned to each Section, the Chief Member functions as a Group Leader (as distinguished from a supervisor as defined by the Civil Service Reform Act).

b. Basic Unfairness: As we understand it, Chief Members, for Merit Pay purposes, are to be evaluated on the basis of the number of cases produced by our respective Sections and by the quality of those decisions as determined by a single individual (selected by and responsible to the Chairman) based on that individual's random review of a small number of cases selected on the basis of claim number digits. We reject this system as inappropriate (See paragraph 5d below) and as inherently unfair. Section production and quality do not depend to any significant degree on a Chief Member's leadership ability, managerial acumen, legal expertise, or even willingness to work long and hard. Section production and quality, in very large measure, depend on the talents of the attorneys assigned to our respective Board Sections. As is the case in any large group, the talents of individual BVA staff attorneys with respect to speed, writing ability, and expertise in VA law and regulations vary considerably. Chief Members have no authority whatsoever to hire, assign, promote, reward, transfer, suspend,

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significantly discipline, etc, the attorneys or even the secretary assigned to our respective Sections. Even the cases the staff attorneys are assigned and directed to work on and the jurisdiction of each Section are, for the most part, selected by a centralized authority outside the Section. Moreover, it cannot realistically be said that we have authority to "effectively recommend" the actions enumerated in the preceding two sentences. This is because the Chairman and Vice Chairman are under no obligation whatsoever to seek our advice prior to such decisions nor are they in any way required to give any weight at all to our requests or suggestions with respect thereto. In summary, too much authority is accruing to the Chairman and Vice Chairman under the Merit Pay System and this cannot help but compromise our decisional independence. (See paragraph 5d below) The potential threat is clear and well understood! For example, the Chairman, for whatever reason, could arbitrarily assign less talented attorneys to a Board Section or change the Section's jurisdiction and then subsequently penalize the Chief Member financially when such actions adversely affect the Section production, or quality, or both. The unfairness of the situation is manifest; we are being subjected to evaluations based on factors (production and quality) over which we have little personal control at present. If we are forced to become a part of the Merit Pay System, we intend to file an additional grievance requesting significant changes in the internal operations of the Board of Veterans Appeals. If we are to be held financially accountable as supervisors, then fairness and equity dictate that we must have the authority to function as supervisors.

c. Inequality of Treatment: It is true that Chief Members perform certain Group Leader functions such as approval of leave and preparation of quarterly evaluations of staff attorneys assigned to their Section. However, none of these functions comes within the parameters of the definition of supervisor as clearly set forth in the Civil Service Reform Act, and even these minor functions are closely circumscribed by oral and written instructions from the Chairman and Vice Chairman and the input

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of the Associate Member. Except for these minor functions, the duties and responsibilities of Board Membership are essentially the same for Chief Members, Legal Members, and Medical Members. In fact, the former Civil Service Commission specifically ruled that the additional duties performed by the Chief Members are insufficient to justify a difference in GS grade level. Under the Merit Pay System, we the Chief Members, will no longer receive within-grade step increases or quality step increases. (See 5 U.S.C. 5402(b)(4)) In addition, because of production and quality factors essentially beyond our personal control, we may also end up receiving less than full annual comparability adjustments and be ineligible for any bonuses under the Merit Pay System. At the very same time that this is happening to us, our two Board Member colleagues (who share our office, review and vote on the very same cases, and work with the same assigned staff attorneys) will continue to receive within-grade step increases and full annual comparability adjustments. This clear inequality of treatment is yet another aspect of the basic unfairness of the situation as discussed at some length in the preceding subparagraph.

d. Judicial Independence: For many years, Administrative Law Judges (and their predecessor Hearing Examiners) have been exempted from the operation of the efficiency rating system. The applicable law provides that they are entitled to prescribed pay "independently of agency recommendations or ratings." (See 5 U.S.C. 5372) The Civil Service Reform Act continued the exemption and thus excluded Administrative Law Judges from the provisions of the Merit Pay System. This legislative history clearly shows the intent of Congress to insulate and protect the decisional independence of quasi-judicial officials. For the best interests of all concerned, it is more important that they be "independent" than "responsive." As we emphasized in our request for reconsideration, the Board's decisions (with minor exceptions) are not subject to the scrutiny of the Courts as are those of Administrative Law Judges. (38 U.S.C. 211(a), 4004(a)) Therefore, we are

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entitled to the same or greater insulation, certainly not less. It is axiomatic that the power of financial reward or the withholding thereof carries with it an inherent capacity to exercise a very strong influence. We, the Chief Members, believe it is essential that the integrity of our adjudicative process be preserved through the exercise of unrestricted decisional independence. We are firmly convinced that the integrity of our highly prized and jealously guarded decisional independence will be greatly compromised by our inclusion in the Merit Pay System. Moreover, such obvious compromise cannot help but generate an adverse reaction in the Congress, among the Service Organizations, and among well informed veterans.

6. Specific Corrective Action Desired: Either of two alternative corrective actions are strongly urged:

a. Appropriate VA officials should determine that Chief Members are excluded from the Merit Pay System because they are not "supervisors" or "management officials" as defined in the Civil Service Reform Act. Such determination is clearly warranted because of the reasons set forth in paragraphs 4 and 5 above.

b. Pursuant to 5 U.S.C. 4301(2)(g) and 5401(a)(2)(C), the Administrator should apply to the Office of Personnel Management for exclusion of Chief Members from the Performance Appraisal and Merit Pay Systems. For the reasons set forth in the preceding paragraphs, particularly paragraph 5, such application is clearly in the best interests of the veterans served by the BVA. It is our understanding that such an application has been forwarded by the Social Security Appeals Council, an appellate body performing functions analogous to those of the BVA.

7. Group Grievance Procedure: Since all Chief Members have an identical grievance, it is requested that this grievance be processed as a group grievance pursuant to MF-5, Part I, Chapter 771, Section C, Paragraph 12. G. Troiano is designated as the individual to have his case processed as a representative of the entire group.

8. Examiner: Section C, Paragraph 7g, provides that the Deciding Official will refer the grievance for inquiry by an examiner within 10 calendar days from the date the formal grievance is filed. Because of the importance and complexity of the issues and the seniority of the persons involved, it is requested that the examiner be very

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carefully selected and completely relieved of his usual duties for a sufficient period of time to allow him to conduct a thorough inquiry and that he be an attorney in grade GS-15 or higher.

9. Morale: Section C, Paragraph 2 (d)(1) provides that a decision on a grievance is to be issued within 90 calendar days after initiation of the informal grievance procedure. In order to prevent further deterioration in morale caused by the factors explained in paragraph 5 above, it is urged that this grievance be processed without delay and resolved satisfactorily. It is our intention to file a written request for a status report at the expiration of each time limit stated in Section C, Paragraph 2(d)(1), such as 10 calendar days for referral to examiner, 45 calendar days for completion of examiners' inquiry, etc.

10. Reservations: We, the Chief Members, reserve the right to further develop and elaborate the arguments set forth in paragraphs 4 and 5 above during the course of the examiner's inquiry, to request various documents and information from VA and BVA officials to support our arguments, and to include as parties to this grievance any person or persons designated as a Chief Member while this grievance is pending. In addition, pursuant to MP-5, Part I, Chapter 771, Section A, Paragraph 2b(3), we reserve the right to utilize a reasonable amount of official time to perfect and pursue this grievance.

R. B. Stander
R. B. STANDER

D. Bierman
D. BIERMAN

R. T. Wood
R. T. WOOD

R. K. Bauer
R. K. BAUER

S. W. Warner
S. W. WARNER

G. Troiano
G. TROIANO

D. Landers
D. LANDERS

W. B. Morris
W. B. MORRIS

E. L. Arpin
E. L. ARPIN

J. J. Butler
J. J. BUTLER

K. J. Wells
K. J. WELLS

C. D. Romo
C. D. ROMO

L. P. Summers
L. P. SUMMERS

F. Kubat
F. KUBAT

R. A. Piccigatti
R. A. PICCIGATTI

F. F. Parris
F. F. PARRIS

I. Kleinfeld
I. KLEINFELD

see next
page

EXHIBIT 4

UNITED STATES GOVERNMENT

Memorandum

DATE: MAR 10 1980

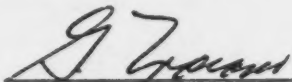
TO: Deputy Administrator, Veterans Administration (001)
THRU: (1) Chairman, Board of Veterans Appeals (01)
(2) Acting Assistant Administrator for Personnel (05)

FROM: Chief Members, Board of Veterans Appeals

SUBJ: Formal Group Grievance; Additional Information

1. Enclosed is a statement from the Legal and Medical Members of the Board of Veterans Appeals. We, the Chief Members, request that their statement (as well as this memorandum and our March 3, 1980, request for status report) be made an official part of our grievance file.

2. We believe that the information now of record is sufficient to warrant a favorable resolution of our grievance by the Deciding Official without additional inquiry. (See MP-5, Part I, Chapter 771, Section C, Paragraph 7g.) If the Deciding Official determines otherwise, we request the expeditious designation of an Examiner. We again urge that the Examiner be an attorney in grade GS-15 or above.



G. TROLANO, for all
Chief Members (See para. 7
of grievance)



Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

VA FORM 3101
JAN 1977

UNITED STATES GOVERNMENT

Memorandum

DATE MAR 10 1980

TO Deputy Administrator, Veterans Administration (001)
 THRU: (1) Chairman, Board of Veterans Appeals (01)
 (2) Acting Assistant Administrator for Personnel (05)

FROM Legal and Medical Members, Board of Veterans Appeals

SUBJ: Chief Members Formal Group Grievance; Support of

1. On February 21, 1980, the Chief Members, Board of Veterans Appeals, filed a Formal Group Grievance with respect to their inclusion in the Merit Pay System. We, the Legal and Medical Members, wish to state formally and through official channels that we are in complete agreement with the arguments set forth in paragraphs 4, 5 and 6 of the Chief Members' grievance.

2. Briefly stated, we believe the inclusion of Chief Members (or any Board Members) in the Merit Pay System is highly undesirable. We are convinced that such inclusion will greatly compromise decisional independence and, in addition, produce severe morale problems in our organization which heretofore has been "a hard working, happy, can do outfit." Moreover, such compromise of decisional independence cannot help but greatly enhance the position of those detractors who argue that BVA decisions should be subject to a wide-ranging, pervasive form of court (judicial) review.

3. We request that this statement be made an official part of the grievance file and that our views be taken into consideration by the Deciding Official and by the Examiner designated to conduct the inquiry.

Ernest B. Wright William T. Bunch R. W. Whitley
C. A. Swales M.D. Charles E. Thomas J. J. Kennedy
J. J. Schale E. H. Bowers J. D. B. G. G. G. G.
W. H. H. H. H. H. E. R. Stanford G. M. Jordan
J. J. Schale R. K. Malanphy H. J. Selby
G. M. G. G. G. J. R. G. G. G. M. D. D. D. D.
Brooks D. D. D. W. H. H. H. H. W. H. H. H.
Donald H. G. G. G. Gordon R. G. G. G. G. G. G. G.



Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

VA FORM 2105
JAN 1977

EXHIBIT 5

FORMAL GRIEVANCE

(16 GRIEVANTS)

GENEROSO TROIANO, ET AL.

VETERANS ADMINISTRATION

CENTRAL OFFICE

WASHINGTON, D. C.

FINDINGS AND RECOMMENDATIONS

ISSUED BY: WILLIAM M. RICKMAN
 GRIEVANCE EXAMINER

DATE: JUNE 27, 1980

FORMAL GRIEVANCE: GENEROSO TROIANO ET AL. *

INQUIRY AT: Washington, D. C.
 INQUIRY ON: May 12-16; 29, 30, 1980
 INQUIRY BY: WILLIAM M. RICKMAN
 GRIEVANCE EXAMINER

ENCLOSURES: (1) INFORMAL STAGE FILE
 (2) STATEMENTS TAKEN - FORMAL STAGE
 (3) DOCUMENTS ACCEPTED - FORMAL STAGE

*GRIEVANTS: Generoso Troiano; Lewis P.
 Summers, III; Woodrow B. Morris; James J.
 Butler; Bruce E. Hyman; David T. Landers;
 Elizabeth F. Parris; Richard B. Standerfer;
 Daniel J. B. Bierman; Rae T. Wood; Roger K. Bauer;
 Samuel W. Warner; Kenneth J. Wells; Charles D.
 Romo; Craig P. Russell; Romulus A. Picciotti.

INTRODUCTION

This formal inquiry was conducted pursuant to the provisions of Veterans Administration MP-5, Part I, Chapter 771, dated August 2, 1971, under appointment by the Veterans Administration Central Office, dated May 2, 1980.

The formal inquiry was requested by the Assistant Administrator for Personnel, Veterans Administration, as the next step in the processing of an unresolved grievance filed by the sixteen Chief Members of the Board of Veterans Appeals (BVA), in response to a determination by the Chairman, BVA, that the Chief Members fell within the coverage of the Merit Pay System of the Civil Service Reform Act of 1978.

Agency Chapter 771 provides (at C 10, p. C-5) that a formal grievance inquiry may be conducted by means of:

- (1) The securing of documentary evidence;
- (2) Personal interview;
- (3) A group meeting;
- (4) A hearing; or
- (5) Any combination of (1) through (4) of this subparagraph.

The examiner elected a combination of options (1) and (2). Option (2) provides that statements "should" be taken under oath, without a pledge of confidence. However, because the examiner found no issue requiring a credibility assessment, he followed a more informal and expeditious practice of accepting signed (but unsworn) statements from all interested parties. Specifically, after statements from several Chief Members, all remaining grievants were advised that they might, on their own initiative, submit statements through their group representative, Mr. Troiano (none submitted statements). Also, five staff attorneys were requested to furnish (and did furnish) statements regarding their perceptions of the degree of control, guidance, direction, or oversight (if any) exercised by the Chief Members vis a vis them in their performance and day-to-day job activities. A statement was also taken from the Acting Vice Chairman, BVA. (In a brief interview, the Chairman stated that he would stand by his statements in the record.)

The total record has been fully reviewed and considered by the examiner in reaching the findings and recommendations set out below. In addition, for the reason explained below, the examiner conducted extensive research in the field of labor-management relations to ascertain what precedents and/or determinations exist which are relevant to the matter at issue in this case.

ISSUES CONSIDERED

Whether the Chief Members, Board of Veterans Appeals, are "supervisors" or "management officials" within the meaning of 5 U.S.C. 7103 a. (10) or (11).

BACKGROUND

By letter dated December 3, 1979, each Chief Member was notified by C. H. Hight, then Vice Chairman, BVA, that a determination had been made that his/her position should be included in the Merit Pay System "because it meets the definitions for supervision/manager under the Supervisory Grade Evaluation Guide/Labor Management Relations Definitions." Each was advised of a right to request reconsideration of this determination, and such request was made. By undated memorandum received December 18, 1979, the Chairman, BVA, advised that, after reconsideration, he had concluded that "your position fully meets the definitions of Management Official in Title VII of the Civil Service Reform Act and Supervisor under the Labor Relations definition and must be covered by the Merit Pay System."

By memorandum dated December 18, 1979, the Chief Members notified the Assistant Administrator for Personnel of their intention to pursue this matter through agency grievance procedures. On February 5, 1980, the Acting Assistant Administrator for Personnel advised that, having pursued the informal proceeding through the Chairman, BVA, the Chief Members might pursue a formal grievance to the Deputy Administrator. The Chief Members filed such a formal grievance by memo dated March 10, 1980. Thereafter, as noted above, this examiner was appointed to conduct appropriate inquiry and to furnish findings and recommendations to the Deputy Administrator.

ANALYSIS AND FINDINGSa. "Supervisor"

Title V, Civil Service Reform Act of 1978, (P.L. 95-495) "Merit Pay," added to Title 5, U.S. Code, Chapter 54 which, at sec. 5401 (b) (1) provides that:

Except as provided in paragraph (2) of this subsection [Presidential exclusion] this chapter shall apply to any supervisor or management official (as defined in paragraphs (10) and (11) of section 7103 of this title respectively) who is in a position which is in GS-13, 14, or 15 of the General Schedule described in section 5104 of this title. [Emphasis added]

Title VII of the Reform Act "Federal Service Labor-Management Relations," amended subchapter of the existing Chapter 71 of Title 5. Therein, at sec. 7103 (a) (10), (11), "supervisor" and "management official" are defined, in pertinent part, as follows:

(10) 'supervisor' means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment.....

(11) 'management official' means an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency.....

At this point it should be noted that the grievants have taken exception to reliance on the labor-management definition of "supervisor" in determining their status. The examiner finds that his determination must be made by reference to 5 U.S.C. 7103 a (10).

The incorporation by reference of a sec. 7103 (labor-management) definition into section 5401 (Civil Service Merit Pay System) clearly implies that established labor-management criteria (in lieu of, or beyond, classic civil service personnel criteria) provide appropriate guidance to a determination of the applicability of sec. 7103 definitions to civil service employees. This implication is made

explicit in Federal Personnel Manual Bulletin 540-1, issued by the Office of Personnel Management on February 22, 1979, (Attachment 3, General Guidelines, paragraph c).

At the same time, in the following paragraph, d., the Bulletin adds:

In making determinations for coverage under merit pay, agencies should examine the actual duties and responsibilities assigned to the employee rather than job titles or written job description which may not be up to date. Job titles may be misleading if the individual, who is called a "supervisor," actually directs the activities of a function rather than supervising other employees.....

Accordingly, the examiner concludes that he is not strictly bound by the wording of the Chief Members' official job description either as to title (Supervisory Attorney, Examiner (veterans), or by that job description's citation of duties and responsibilities. The examiner has inter alia considered the history of the Chief Members' positions, as well as the responsibilities and duties as actually performed in reaching a conclusion whether they are "supervisors" or "management officials," within the meaning of 5 U.S.C. 7103 (a) (10), (11), and so subject to the Merit Pay System.

An examination of the history of the Merit Pay System provisions of the Civil Service Reform Act of 1978 discloses that the original Senate Bill 2640 defined coverage thereunder or relating to "any employee in a position which regularly requires the exercise of managerial or supervisory responsibilities" in the grades of GS-13, 14, or 15. The relative vagueness of this definition is apparent. At least the final version referencing sec. 7103 a. (10), (11) had the virtue of being essentially the same definition as is found in Federal labor-management relations Executive Order 11491.¹ That definition has behind it a body of interpretation and

¹. E.O. 11491, sec. 2 (c) (as amended): "'supervisor' means an employee having authority, in the interest of the agency, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the case of independent judgment..." The Reform Act definition was substantively changed only by the addition of a partial exemption for nurses and firefighters (two groups who, apparently, had sufficient Congressional clout to receive special treatment). Par. 4.b. of the grievance memo argument for an inclusion by reference of this exclusionary reference into the main body of section 7103 a. (10) is without merit, the intentional limitation of the reference being clear on its face.

precedent from which guidance may be found in the instant case.

In 1975, E.O. 11491 was amended;^{1a} inter alia sec. 2 (c) was amended to delete evaluation of performance as a supervisory factor. The Report and Recommendations of the Federal Labor Relations Council which accompanied ^{the amendments stated} that a variety of proposals had been received to narrow the definition of "supervisor" because it was resulting in the exclusion from bargaining units of employees who were only "work leaders." The principal cause of this exclusion, it was stated, involved the preparation of performance evaluations. The council therefore recommended deletion of this criterion, on the basis that preparation of such evaluation alone was not sufficient to make an employee a "supervisor", although such preparation was a factor to be considered along with others. The Council specifically declined to recommend that the definition be made to conform to other uses, such as in position classification.

The examiner reviewed at the Central Office, Division of Personnel, the BVA Union Recognition file to ascertain what determination currently prevails with respect to BVA employees. That file disclosed that by letter dated August 26, 1969, AFGE Lodge 17 was notified in pertinent part as follows:

The unit is composed of all non-supervisory Attorney-Advisers in the Board of Veterans Appeals, except Associate Members and those attorneys on the immediate staff of the Board Chairman.

The record contains no challenge to, or change in the BVA's recognition status from that set out above. With respect thereto, the examiner finds that this 1969 determination, even disregarding BVA changes and labor-relations executive order changes in the interim, is an intragency administrative determination with no precedent value.

With respect to the position description for Supervisory Attorney Examiner (Veterans), GS-905-15, the examiner finds no prima facie indication that the Chairman's statement in either the reconsideration decision or the February 25th memorandum was incorrect. The grievants, however, in their formal grievance memorandum of February 21, 1980, and in much more detail in their statements to the examiner, take the approach that in reality, their job description's reference to "direction and supervision of the professional and administrative activities of an appeals board section and its supporting consultant staff" is something substantially less than that. Specifically, Representative Troiano contends that, instead of being

"supervisors," Chief Members are "group leaders"; and in support thereof he submits a copy of the "Position-Classification Standard for Work Leader/Grade-Evaluation Guide" (U.S. Civil Service Commission - January 1976). Several statements, set out below, offer specifics in support of this position.

...In regard to the specific functions of "Supervisor"... enumerated in the Civil Service Reform Act, I have furnished you with a detailed list showing those we categorically deny performing. We discussed these at length and my fellow Chief Members have furnished you a number of statements including and elaborating thereon.

As to the elements shown by me with a question mark, I will reiterate my explanations. We "direct" our attorneys only as to the decisions to be prepared on appeals in which there have been conducted personal hearings. As to those, we hold executive sessions after the hearings, in which each member casts his vote. In all other cases, decisions are submitted by the attorneys as they see the merits justify. These are signed or modified according to the votes of all the Members of the Section. This however is a judicial and not a supervisory function.

The matters of "discipline" and "adjustment of grievances" are of the most minor type and rare and no more than would be handled by a Group Leader, hereinafter defined...(Chief Member Generoso Troiano)

...I would like to elaborate upon our contention the Chief Members are not supervisors, within the meaning of the applicable statutory provisions, so as to make us subject to the Merit Pay System.

With respect to promotions, there have been instances when my recommendations have simply disappeared somewhere in the front office, and in at least one case my repeated effort to have a probationary employee dismissed was unsuccessful. Whatever our paper authority may be, we do not in fact exercise supervision, as that term is generally understood... (James J. Butler, Chief Member)

...I would like, as a grievant, to offer a few observations concerning the role of the Chief Member. As you see, the Board consists of a relatively small number of attorneys and even less physicians; the supervisory function is practically nil, because attorneys and physicians need virtually no supervision. Each section virtually runs itself. Ours is a "one product economy": sound, well-reasoned and well-written appellate decisions.

Interestingly, the implementing statute^{refers} to all members as "associate" members. The Chairman is authorized to designate Chief Members of each section of three members. In theory at least, any member could be designated as Chief Member. All members are appointed by the Administrator and approved by the President.

The "supervision" exercised by the Chief Member is a "somebody has to do it" sort of thing. We prepare quarterly qualification evaluations on the attorneys assigned to our section. This is because we review the attorneys' work on a daily basis and someone has to comment on whether the work is good, poor, etc. This is just about our only so-called management function. The Chairman is not bound to ask for or to adopt our recommendations for promotion. The work of staff members is being continuously monitored by the Vice Chairman, so we really have no significant performance-evaluation role. Our overwhelming role is to deliberate on appellate matters before us.

As for discipline, to my knowledge, no Chief Member has had to admonish, reprimand or otherwise discipline a staff member; such actions are just unknown here. Recently, warnings of "unacceptable performance" were prepared in the Front Office and sent to Chief Members for routine signature and issuance, after a consensus opinion that the staff member was not doing the job. The reason why this is done is important. The Chief Member is not asked to prepare the letter so that he or she can be free to attend to the job he is here to do: Reach appellate decisions in the cases before him. We are simply not "supervisors" or "management officials", within the meaning of 5 U.S.C. 7103 a. (10), (11).

I think it should be noted also that the standards for promotion, within-grade increases, and for an attorney-adviser to retain his position are exclusively the standards of the Front Office. They are not the standards of the Chief Members. When Chief Members evaluate the quality of work of their attorneys they do so exclusively in terms of the standards set by the Front Office...(Bruce E. Hyman, Chief Member)

Our supervisory duties are so minimal we feel we do not truly meet the criteria for "supervisor" or "management official." We are assigned attorneys who prepare decisions for the members. We have no say over the assignment of these attorneys, and we have no role in their hiring. Our direction of them is limited to calling to their attention errors in their work. Of course, if they are new, we try to acquaint them with VA law and give them what guidance we can...

Another evidence of lack of control concerns our secretary. She does not call in sick to me; she calls in to one of the front office secretaries. If the secretary proved unsatisfactory, I suppose I could complain to get another, but I do not in any real sense "supervise" her.

As for leave approval, I initially approve leave by following agency administrative guidelines as to how many may be off. I must request an exception from the Vice-Chairman. The associate members merely advise me when they will be off; I do not approve or disapprove their leave per se, except to try to comply with guidelines or request an exception from the Vice-Chairman when necessary... (Elizabeth F. Parris, Chief Member)

I understand our Chairman has made a statement to management that Chief Members do "effectively supervise." As a practical matter, the authority of Chief Members is largely illusory. I have three examples to cite concerning promotions.

First, in August 1976, a GS-13 in my section who was mediocre at best, and who was detailed out at the time, was promoted without a recommendation from me. In fact, I was diametrically opposed to his promotion.

Second, in March 1978 a GS-12 who was, I thought, deserving of promotion, was promoted while I was still in the process of preparing a promotion recommendation.

Third, in May 1978 I recommended an extremely competent GS-13 for promotion to GS-14. Despite several follow ups it took me well over a year to get him promoted. This employee was highly motivated; he had a judicial temperament. However, his production was in the average range, and because of the "numbers mania" here, mediocre employees with higher numbers were promoted before he was.

These three examples are indicative of the role of the Chief Member; i.e. any supervisory authority exercised by Chief Members is minimal and incidental...

(David T. Landers, Chief Member)

Personally, I do not think Chief Members meet the statutory definition of supervisory or management official, even to the extent of "effectively" recommending actions. The Board is so set up that the Chairman is virtually autonomous in making management decisions and may effectively disregard recommendations from his staff (and frequently does so)... (James U. Johnson, Associate Member)

In addition to the management statements already in the record, Acting Vice Chairman Kenneth E. Eaton, BVA furnished the following statement:

Concerning the supervisory duties of the Chief Members of the Board, it is clear that the Chief Members are primarily responsible for reviewing and signing appellate decisions. Their supervisory duties are secondary in nature, however, they do have control over the training and the work of the six or seven attorneys and the secretary in their Section. They are the "boss" when it comes to deciding the procedures to be followed within the Section. The Chief Member cannot tell the Law Member or the Medical Member how to vote, but he/she can tell each of them how the Section will be run on a procedural basis. The recommendation of the Chief Member carries great weight in the management decision to promote or fire an employee in their Section. It is my opinion that the Chief Member should be considered the equivalent of an Administrative Law Judge. I believe that Chief Members effectively recommend such actions as would place them in the position of a supervisor within the meaning of 5 U.S.C. 7103(a) (10).

On February 25, 1980, the Chairman, BVA, forwarded the formal grievance to the to the Deputy Administrator with the following statements:

- a. The Chief Members do have the authority to effectively recommend promotions, rewards and disciplinary actions.
- b. The Chief Members have a direct influence on the quality of decision and output of the section. This is a manager's responsibility.

These specifications are consistent with the Chairman's reconsideration decision, in which he found that Chief Members were both "supervisors" and "management officials."

The grievant's statements acknowledge that they do some of the things that supervisors customarily do: they approve leave, prepare ~~performance evaluations~~ ^{performance evaluations}, counsel staff attorneys about cases and, in general, run the section. At the same time, they contend, in effect, that the section tends to run itself; that their supervisory duties are routine administration; and that their authority, such as it is, is not "effective." They cite striking examples: a secretary who does not report to the Chief Member; experiences wherein they have seen their recommendations ignored, or actions taken as if there were no Chief Member authority to recommend.

The Position-Classification Standard for Work Leader/Grade-Evaluation Guide does reflect a similarity in the examiner's view, between the grievant's responsibilities as currently performed, and those of "work leader." The work leader himself participates in the work of the group led, with "leader" duties added. The obvious weakness in the grievant's contention was pointed out above: The Federal Labor Relations Council (FLRC) specifically declined in 1975 to make the labor-management definition of "supervisor" conform to other uses, such as in position classification. Thus, it must be recognized that the work leader guide is not an authoritative source through which to distinguish between "supervisor" and "work leader" or other non-supervisor for the purposes of sec. 7103 a. (10). Nevertheless, the examiner finds, from labor-management law precedents, that a distinction between "supervisor" and "work leader" carries over to that sector.

The examiner reviewed a number of labor-management decisions of the Assistant Secretary of Labor for Labor-Management Relations (A/SLMR) and appellate decisions of the FLRC as well as available guidelines with respect to bargaining units. Although several cases were found which addressed the issue of "supervisor" vs. "work leader," all were clearly distinguishable from the instant case. One of these², however, contained language which makes a clear distinction between these employee categories:

.....(The qualifying words and phrases in the definition) were designed to assure that persons determined to be supervisors would possess actual authority, as distinct from work leaders... (emphasis added)

If the grievants do not in fact possess "actual authority," then they are, as contended, "work leaders."

² Federal Deposit Insurance Corporation - A/SLMR #459; FLRC #75A-39, (8/14/75)

The landmark companion cases which spell out the distinctions between a supervisor and a work leader are China Lake and Mare Island.³ These are two quite similar fact situations, with the issue in each case being the exclusion from the bargaining unit of Fire Captains (called Supervisory Fire-fighters Structural at Mare Island) GS-7 and GS-6. Duties of both were essentially the same. At China Lake, the Fire Captain, who served directly under an Assistant Chief, went with the crew to the fire and directed operations in the absence of, or until the arrival of, the Assistant Chief (who took charge upon arrival). The Captain had authority to shift personnel daily to balance personnel needs; to assign, equitably, overtime and odd jobs. At a fire he had authority to call in specialists (electricians, plumbers, etc.) as the need required. Because the exigencies of the situation usually dictated actions, there was little room for independent judgment. The Captain could suspend employees for up to one hour for an infraction such as drunkenness and recommend more serious action to the Chief or Assistant Chief. Captains also participated in first-level grievances. Training was usually done by crew chiefs. However, Captains prepared performance evaluations for higher review; they certified acceptable level of competence, and they could initiate recommendations for quality step (pay) increases.

The Assistant Secretary determined that Captains were not "supervisors" as defined by sec. 2(c). He found their influence over job assignments minimal and activities clearly supervised by Assistant Chiefs. Procedures were routinized; Captains worked closely with Firefighters. The Assistant Secretary further noted:

...While the evidence indicates that Captains have some functions and responsibilities which distinguish them from other Firefighters, the authority vested in the Captains generally is of a routine or clerical nature not requiring the use of independent judgment. Thus, the Captains clearly have no authority to hire, discharge or lay off employees and the extent of their capacity to discipline employees is limited to one-hour suspensions...

3. U.S. Naval Weapons Center, China Lake, Calif. and Local NO. F-32, Int. Assn. of Fire Fighters, AFL-CIO, A/SLMR No. 128, FLRC No. 72-A-11; Mare Island Naval Shipyard, Vallejo, California and Local No. F-48, Int. Assn. of Firefighters, AFL-CIO, A/SLMP No. 129, FLRC No. 72A-12.

they have no authority to resolve formal grievances and their decisions as a result of preliminary discussions with aggrieved employees are not determinative, but are subject to multiple levels of appeal...

Finally, the Assistant Secretary concluded that their personnel evaluation authority was not "effective," in that they were completed routinely; and their evaluations "have minimal importance in the evaluation of these employees." (The Mare Island determination was similar.)

The agencies involved appealed, contending that the Ass't. Secretary had unduly modified the sec. 2(c) definition, injecting such words as "formal," "permanent" and "sufficient." Further, they contended that sec. 2(c) should be applied in the disjunctive - i.e. that possession of even one of the indicia of supervisory authority sufficed to exclude the employee.

The Council disagreed sharply with the determination of the Assistant Secretary, remanding the case for determination of narrow issues of fact. However, in so doing, the Council laid down several principles. They agreed that section 2 (c) is in fact applicable in the disjunctive; and they agreed that the Assistant Secretary had unduly modified the section. In China Lake the Council held as follows:

...As apparent from use of the conjunction "or", section 2 (c) is written in the disjunctive... As a general rule of statutory construction, words are to be given the meaning commonly attributed to them in the absence of legislative intent to the contrary. In this case, there is no indication of (a contrary intent)...indeed, the purposes of the Order fully support a literal application of section 2 (c)... In view of the above, we find that section 2(c) must be applied in the disjunctive...(and) once the possession of the authority to perform one of the functions set forth in section 2(c) has been established, we hold that that individual is a supervisor....

The decision continued:

2. Does the fact that an alleged supervisor's recommendations are subject to review by higher ranking officials render his recommendations ineffective? Section 2(c) requires that an individual possess the authority actually to perform one of the tasks listed therein, or that an individual possess the authority "effectively to recommend such action,"

In our view, the mere fact that a recommendation is reviewed or approved by a higher ranking management official does not, in itself, render a recommendation ineffective. Rather, we hold that the Assistant Secretary must look to the nature and scope of the review in order to determine the effectiveness of the recommending authority within the meaning of section 2(c). Thus, as a general rule, the evidence must establish only that a recommendation is made on behalf of management, that it is based upon the independent judgment of the alleged supervisor, and that the recommendation -- either considered separately or in conjunction with the recommendations of other supervisors or management officials -- could result in a decision by management to hire, transfer, suspend, or take any of the other actions set forth in section 2(c). To be effective, it is not necessary that one recommendation by one individual be the sole criteria used by higher management in determining whether to take one of the actions listed in section 2(c).

As a practical matter, any other interpretation of the term "effective" would be clearly contrary to the realities of the exercise of authority in the Federal sector. For example, with respect to promotions, in the Federal sector virtually all decisions as to promotions to a higher grade level are made pursuant to established procedures which explicitly require that the recommendation of a lower level supervisor be reviewed or approved by higher officials before being put into effect. Therefore, the key to determining the effectiveness of an alleged supervisor's recommendation is not the mere fact of review, but the impact which that recommendation has upon the overall promotional procedures in force at an activity. In other words, the question is whether that recommendation, even though reviewed at a higher level, results in the promotion or refusal to promote an employee to a higher grade level.

From these principles, then, we adduce that it is enough if the grievants have the authority to perform, or to recommend effectively, any one of the criteria set out in 7103a(10). Further, words must be given their common meaning; and a recommendation, to be effective, need not be adopted, as long as it meets the other conditions set out.

Mr. Troiano, on behalf of the grievants, has listed each of the criteria and then indicated the grievants' opinion of their authority, or absence thereof, with respect to each. Concerning "assign," "promote," "reward," "transfer," "furlough,"

"layoff," "recall," "suspend" and "remove," he notes "no." With respect to the rest, he indicates a question mark.

The examiner concurs in the elimination of all except "promote" and "reward." He finds that the grievants have no effective authority with respect to the assignment, transfer, furlough, layoff, recall, suspension or removal of employees. It has been testified that the "front office" pays little attention to requests even to reassign (much less remove) "deadwood" employees; and while there may be some hyperbole here, the clear frustration expressed by some grievants over their perceptions of impotency in staffing matters was real enough.

With respect to "promote" and "reward", the examiner finds that they must be lumped with "discipline," and "adjust grievances" in the question mark column because of the qualifier "or to effectively recommend such action."

The grievants' authority to discipline is minimal; likewise, to adjust grievances. The examiner is persuaded that the grievants, in practice at least, lack effective authority directly to discipline employees or adjust their grievances; with respect to the latter, the senior attorney appears to handle the everyday sort of dissatisfactions among the staff attorneys, and the members appear to work things out pretty much among themselves.

There remains, in the category of direct authority, the criterion "to direct"; and in the category of authority to recommend, "promote," "reward," "discipline" and "adjust grievances." (Also, to prepare performance evaluations.)

The examiner finds the Chief Member's "direction" of other members to be pro forma; he is, as first among equals, in charge of hearings and the like, but in the examiner's view much authority is not supervisory in nature. Further, the examiner finds that the grievants' "direction" of the section is, effectively, the direction of a function, not of employees per se. Virtually all direction of attorneys, other than case discussions, is accomplished by senior attorneys.

In the course of directing the section's function, however, certain responsibilities devolve upon the Chief Member; and these include the authority to do or to recommend, that which is essential to the operation and effective

functioning of the section. It appears that this is the will of the Chairman, that the Chief Members be relieved of as much administrative responsibility as possible. However, to the examiner, the fact is inescapable that the Chief Members can, and, on occasion do, recommend staff attorneys for promotions or quality step increases ("rewards"). Likewise, in a situation where (for example) a staff member may have been guilty of a serious breach of integrity or some other misdeed, it is inconceivable that the Chairman does not expect, and the Chief Member does not feel a responsibility to report, the facts to the Chairman/Vice Chairman and to recommend some specific corrective action based upon his/her knowledge of the case. Whether he/she so recommends, the examiner finds that in such a situation the Chief Member has the authority, and the responsibility, to do so.

As for adjusting grievances, again it appears clear that should a serious employee dissatisfaction surface in the section, the Chief Member, even if lacking authority (and responsibility) to resolve it at that level, does have the authority to recommend a resolution and, in the interest of all concerned, would so recommend.

Finally, there is the preparation of performance evaluations which, standing alone, do not make one a "supervisor." Nevertheless, the record shows that the Chief Members (in consultation with Associate Members) does prepare performance evaluations. These evaluations provide management with information concerning the degree of progress of the attorneys, and are clearly the product of independent judgment. Accordingly, teamed with other criteria, it is a significant supervisory function.

Considering the broad and definitive responsibilities set out in pars. 1 and 2 of the Chief Members' position description,⁴ (P.D.) these findings may appear on

⁴. The position description states in pertinent part:

1. Is immediately responsible for the direction and supervision of the professional and administrative activities of an appeals board section and its supporting consultant staff...
2. Is responsible for continuous supervision over quality and quantity accomplishments in the section. Responsibility is met through self-evaluation and planning, training, and application of quality control standards, work measurement and other management techniques.

on their face to be unduly narrow or labored. However, the examiner, as noted above, has, in reviewing the record, taken into account the history of the Chief Member position. The P.D. was drafted in 1966 with a view to elevating the positions to GS-15; and for that purpose it was essential to distinguish sharply between chiefs and associates. Shortly thereafter (5/67) the associates filed a successful appeal for reclassification to GS-15. The CSC decision stated in part: "...The Chief Member has no more substantive authority and responsibility than the other Members..." (emphasis added) and found the Chief Members' administrative responsibilities insufficient to warrant a higher grade than that of associates, especially in view of the oversight of attorneys practiced by senior attorneys.

The record does not support a finding that the Chief Member ever functioned in the authoritative manner contemplated by P.D. pars. 1 and 2. If anything, the examiner has found, an assertive Chairman has tended further to dilute the administrative responsibilities of the chiefs in order, it appears, to enable them to devote more time to adjudicative duties.

This said, however, the examiner finds that even the protestations of the grievants have never gone so far as to claim total administrative impotence. In fact, the record supports a finding that the Chairman/Vice Chairman, EVA, do consider and, in a significant number of instances, accept, the recommendations of the Chief Members. In some cases where they have not immediately acted upon the recommendation -- as in the cited instance where a promotion was delayed, and less capable but more productive attorneys were promoted -- the fine hand of the "front office" was nevertheless apparent -- i.e. there appears to have been a conscious decision to "go with" productivity. Under the China Lake criteria, it is obviously enough that the authority to recommend have substance -- be the product of independent judgment (as promotion recommendations almost invariably are) -- not that the recommendation be accepted in all or even most instances.

The examiner is therefore persuaded that Chief Members do have effective authority to make recommendations in the areas indicated. Accordingly, the examiner, for the reasons stated, finds that the grievants are "supervisors" within the meaning of 5 U.S.C. 7103 a(10), and as such are subject to the Merit Pay System established by the Civil Service Reform Act of 1978.

b. "Management Official"

5 U.S.C. 7103 a(11) describes a management official as one whose duties and responsibilities "require or authorize the individual to formulate, determine or influence the policies of the agency."

FPM Bulletin 540-1 states, in its guidelines, that:

...To effectively influence a policy decision, it is necessary for the employee to actively participate in the ultimate determination as to what the policy in fact will be... [Emphasis added]

After a thorough examination of the role of the Chief Member, the examiner is persuaded that the nature of the grievants' position neither requires nor authorizes formulation (i.e. initiating and developing?), determination (i.e. deciding what it will be?), or influencing of agency policy in any "ultimate" sense.

The Chief Member, according to the position description, is in charge of a section of some 10 employees. The Chairman, BVA, has stated for the record his view that Chief Members are management officials in that they "have a direct influence on the quality of decision and output in the section."

The examiner, for reasons set out in part above, finds little practical support for this position. All three members (and, to a significant degree, the senior attorneys) are involved in and contribute (pro or con) to the quality-control and productivity aspects of decision writing; and together they set the tone in the section for these facets of the operation. The degree of control exercised by the Chief Member would appear to depend almost entirely upon the force of the individual Chief Member's personality. One of the grievants' strongest equitable objections to Merit Pay System coverage is directed at their sense of lack of control over quality of personnel and consequent quality and quantity of production. The only apparent basis for saying that Chief Members formulate, determine or influence agency policy lies in their decision-making functions. However, that responsibility/authority is shared equally with associate members. Furthermore, any ultimate influence is fortuitous. Mr. Troiano makes this point effectively:..."it is important to note that our appellate decisions are not precedents to be followed by other Board Sections or agencies of original jurisdiction..."

Quality and high productivity are altruistic agency objectives; striving toward such goals or even persuading or influencing others to do so is not "influencing" agency policy; the policy exists, it is built in.

The examiner does find in the grievant's position description two duties (other than 1 and 2) which agreeably suggest a "management" role for Chief Members:

Paragraphs 7 and 8. They read as follows:

7. Advises the Vice Chairman on significant policy and procedural aspects of individual case decisions rendered and of their impact on the appellate and benefit programs.
8. Confers with representatives of the General Counsel's Office, the Department of Veterans Benefits, Medicine and Surgery and Insurance and with service organizations to discuss either individual appeals cases or those issues which have a veteran-population-wide impact.

In other words, the Chief Member has consultative responsibilities with his immediate superior, the Vice Chairman, and with representatives of other policy-level officials, and with veterans' organizations concerning matters which are perceived as likely to affect policy. In so doing, the Chief Member's role is, the examiner finds, "limited to rendering resource information or recommendations rather than active participation in final determinations of policy."⁵ As such he is not a "management official."

The examiner has studied the guidelines furnished in FPM Bulletins 540-1, 540-2; VA Interim Issue 00-79-31; and OLMR Management Practices Manual. Nothing he found therein persuades the examiner that the grievants are "management officials," within the meaning of 5 U.S.C. 7103 a.(11).

c. Equitable Consideration

The grievants have stressed their unanimity in opposition to inclusion in the Merit Pay System and have called attention to impressive support from their Associate Members. Interestingly, pay per se seems to be a minor concern (though some grievants expressed concern at having their pay partly determined by the performance of employees over whom they had minimal control and no "say" about assignments). Several of the senior grievants, at the top of their grade and with no salary axe to grind, nevertheless came forward to make strong statements

⁵ U.S. Army Reserve, 166 Support Groups, Fort Buchanan, P.R. -A/SLMR #1171, 12/28/78

expressing their concern over the integrity of the adjudicative system.

Some comments follow:

I am one of the Senior Chief Members and am eligible to retire. However, I would like to express my concern over the determination that Chief Members are subject to the Merit Pay System. It seems to be a step to gain tighter management control over employees who, by the nature of their jobs, must be free to exercise a degree of independence and certainly to adjudicate without feeling that they are under someone's thumb. I fear that this determination would be a first step to the politicizing of an organization which over the years has had a lot of pride and sense of independence ... (Woodrow B. Morris, Chief Member)

I am one of several Chief Members who are eligible to retire and who thus can be viewed as having a lesser personal stake in this grievance. Nevertheless, I want to express my deep concern over Chief Members being subject to the Merit Pay System. We have been gratified that the EVA has over the years been free of outside interference, and members have had an opportunity to apply independent judgment to the adjudicative process. We are frankly alarmed at the implications which seem to be inherent in "pursestring control" of Chief Members. The very fact that we older Chief Members are so greatly disturbed about this change is indicative of our regard and respect for the organization as presently constituted; and we believe that any step which could open the door to politicization of our appellate system is certain to affect adversely the effectiveness of our program and the morale of our staff... (Lewis P. Summers, III, Chief Member)

Another disturbing factor to me is the public effect, once appellant representatives learn we are operating under a "reward and punishment" system. The first such representative who loses will scream to high heaven that our decisions are subject to influence and so are not fair and impartial... (James J. Butler, Chief Member)

I know of no other GS-15 employee whose appointments are subject to Presidential approval. It seems clear we were meant to exercise independent, unfettered judgment in the decision making process. It seems equally clear that placing Chief Members under the Merit Pay System will jeopardize that independence... (David T. Landers, Chief Member)

There appear to be, in addition to morale problems, two basic conflicts with decisional independence. One, placing Chief Member under Merit Pay gives the Chairman and Vice-Chairman additional "clout", though the purse strings, in getting their viewpoints adopted. Two, a Chief Member

whose pay rate may depend upon productivity may tend to neglect thoroughness and quality in favor of getting cases out. This could result in a potential "allowance" being overlooked. (James U. Johnson, Legal Member)

My feelings concerning the inclusion of Chief Members in the Merit Pay System are very much as expressed in our petition. The basic questions concern considerations of the type of work we do and judicial independence. We feel that our work is not too different from that of Administrative law judges, who are excluded...

The staff concern over [inclusion in the Merit Pay System] has been so great that we have already lost several extremely promising attorneys and law members, who are taking Administrative law judge positions. The moment we come under the Merit Pay System the threat to our judicial independence comes into being: it creates a "rewards and punishments" situation not now existing. I do not think that such a system comports with accepted concepts of judicial independence.

(Elizabeth F. Parris, Chief Member)

In summary, the grievants, keenly aware of their "Presidential appointee" status, and seeming to possess a high esprit de corps, believe that they have been unfairly singled out to be placed in a salary category which they regard as demeaning. More importantly, they have grave concerns about participating in a pay system which seems to provide unprecedented opportunities for political mischief, to the detriment of the integrity of their adjudicative system.

One reason the grievants do not feel that they deserve such special (and unwelcome) categorization is found in the language of Title 38, U.S. Code, Chapter 71, secs. 4001, 4002, wherein all members are defined as "associate members," with the Chairman authorized to create sections and "designate" a chief for each. The inference is clear that "chief member" is a title which could be rotated among associate members, or the duties handled in any other way the Chairman sees fit.

The grievants have analogized their positions to those of Administrative Law Judges, and have made other interpretations of the Civil Service Reform Act which they suggest indicate an intent not to include their positions under the Merit Pay System. The examiner considers the language of 5 U.S.C. 5401 (b) (1), read in conjunction with 5 U.S.C. 7103 a(10)(11), to be clear on its face in stating that, except for specific exclusions not presently applicable to the grievants, any "supervisor" or "management official"

at GS-13, GS-14 or GS-15 is covered by the Merit Pay System. Nonetheless, the examiner has been so impressed with the sense of demoralization conveyed by the grievants and believes their concerns to be predominantly altruistic.

RECOMMENDATIONS

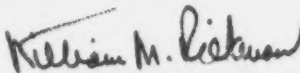
I. The examiner recommends that the current determination that grievants are "supervisors", subject to the Merit Pay System, be sustained.

II. The examiner recommends that so much of that determination as found the grievants to be "management officials" not be sustained.

III. Because it seems less than certain that Congress specifically intended⁶ that adjudicative functions such as EVA be subject to the Merit Pay System, and in view of what he regards as valid equitable arguments against it, the examiner recommends that the deciding official take appropriate steps to provide an exclusion for grievants, on one of the following bases:

- a.) Preferably by consultation with Chairman,⁷ EVA concerning the feasibility of converting "chief member" to a title carrying only the responsibilities related directly to the adjudicative process, and making all EVA members exempt from the Merit Pay System.
- b.) Alternatively (or even concurrently) recommending to the Administrator that application be made pursuant to 5 U.S.C. 5401 (b)(2)(c) for a Presidential exclusion under 5 U.S.C. 5401 (b)(2)(A)(iii).

Respectfully submitted,


WILLIAM M. RICKMAN
GRIEVANCE EXAMINER

⁶ 5 U.S.C. 5401(b)(2)p provisions for Presidential exclusion.

⁷ Chairman has stated, in a letter to Merit Systems Protection Board dated May 8, 1980: ...Since each of the three members of the sections of the Board of Veterans Appeals has an equal vote when it comes to deciding an appeal, the primary responsibility, it would appear reasonable for all to be paid on an equal basis. I would interpose no objection if it were determined that the Chief Members...are exempt from the provisions of Merit Pay...

EXHIBIT 6

MAY 3 1980

Office of the Secretary
Merit Systems Protection Board
Washington, DC 20419

RE: Gene Troiano, et. al.

Docket # DC075209112

Thank you for the copy of the petition submitted in the above-docketed case and for the opportunity to respond.

While I have nothing to add with respect to the issue of jurisdiction, I would like to point out that there is very little difference between the duties and responsibilities of Members of the Board of Veterans Appeals and Administrative Law Judges who do not come under the merit pay provisions of the Civil Service Reform Act of 1978. I understand that certain Administrative Law Judges perform some supervisory responsibility just as Chief Members do. Since each of the three members of the sections of the Board of Veterans Appeals has an equal vote when it comes to deciding an appeal, the primary responsibility, it would appear reasonable for all to be paid on an equal basis.

I would interpose no objection if it were determined that the Chief Members of the Board of Veterans Appeals are exempt from the provisions of the merit pay under the Civil Service Reform Act of 1978.

SYDNEY J. SHUMAN
Chairman

✓ CC: Gene Troiano

Mr. BREW. What I'd like to do now is just ask the questions that Senator Cranston was going to ask you and have each or any of you to respond as appropriate.

First, before I start that, Mr. Bierman, the ranking that you mentioned of the various sections, would you provide a copy of that to go into the record of the hearing——

Mr. BIERMAN. Yes.

[Subsequently, the Board of Veterans' Appeals submitted the following information:]

BOARD OF VETERANS APPEALS
1980 Rankings
(Raw decision count)

SECTION RANK	SECTION NUMBER	JURISDICTION
1	13	EARS - SMC
2	15	EARS - EYES - GU - GSW
3	14	EARS - NOSE & THROAT - DENTAL
4	5	EARS - SMC - GSW
5	1	EYES - GSW - SMC - RADIATION
6	16	GENERAL - GSW
7	4	<u>INSURANCE</u> - POW
8	2	GSW - NEUROLOGY - <u>WAIVER</u> - TR-TERMINATION
9	9	EARS - EYES - GSW - SMC - 351
10	8	<u>INSURANCE</u> - ASBESTOS - AGENT ORANGE
11	12	EARS - NOSE & THROAT - <u>VR&E</u> - EDUCATION LOAN- <u>REIMBURSEMENT</u> - <u>WAIVER</u>
12	3	<u>LEGAL</u> - <u>INSURANCE</u> - <u>OVERPAYMENT</u> - <u>PHIL</u> <u>FORFEITURES</u>
13	7	<u>DOM. RELATIONS</u> - <u>CORPUS</u> <u>& INCOME</u> - <u>WAIVER</u> <u>REIMBURSEMENT</u>
14	11	<u>DOM. RELATIONS</u> - <u>FORFEITURE</u> - <u>NEUROLOGY</u>
15	10	<u>VR&E</u> - <u>CORPUS & INCOME</u> - <u>WAIVER</u> - <u>NEUROLOGY</u>

The legal jurisdictions are underlined.

DOM. RELATIONS - DOMESTIC RELATIONS

GSW - GUNSHOT WOUND

GU - GENITOURINARY

SMC - SPECIAL MONTHLY COMPENSATION

VR&E - VOCATIONAL REHABILITATION

351 - 38 USC 351

Mr. BREW. And as necessary, if it's not developed enough, in your view, to show what the jurisdiction was of the different sections in their ranking, if you could expand on that so that it would be clear to the point that you are making about how the ranking equated to what the jurisdiction of the different sections was.

The first question, is it a fair statement that you, at least in part, oppose being placed under the merit pay system because of concerns that you might be subjected directly or indirectly to new pressure from the Administrator or others in the central office to reach a particular result in certain cases or categories of cases?

Mr. BAUER. I think that the fear is not that we will be tampered with on an individual case, although certainly approaches of that nature may come along from time to time, provided this system exists. I think the thing that really is more realistic as far as potential problem would be arbitrary changes in what should be allowed and what should be denied. An administration which is pushing fiscal responsibility and restraint can influence indirectly through this means, without going through the formal legislative process which would probably be the appropriate one to restrict benefits programs.

By the same token, again, another administration may decide the economy needs a boost and this is an effective way to redistribute some income and again exert this pressure.

We feel that there's nothing wrong with those considerations, provided they are directed through appropriate legislation.

Mr. BREW. In your formal statement you draw an analogy between Board members and administrative law judges. One immediate difference between these two groups is that virtually all ALJ's are subject to having their opinions reviewed by courts, which of course is not true in the main for BVA members.

The suggestion is that this review function serves at least in part as a check on the performance of ALJ's. If the BVA chief members were removed from that pay system, what mechanisms do you believe would then be available as a check on your performance, as a way of monitoring, providing the function that a court would?

Mr. BAUER. In other words, to maintain a reasonable degree of productivity and certain standards of quality within decisions, and to avoid Board members from taking opportunity to more or less retire on the job?

I think we addressed it to some degree in our formal statement, but basically, we feel that the chairman would be left, within the proposals that we've made, the power to exercise considerable managerial influence. Certainly he assigns the Board members to sit in the panels of three, and certainly if one person is dragging, he would obviously bring in the other two Board members to produce peer pressures. He also has a certain amount of psychic club influence in that he does designate the travel boards, where they go, and certainly—

Mr. BREW. Is that a reward or a punishment?

Mr. BAUER. It could be either one, I would imagine.

He also has the authority, where there are dissenting opinions, to assign additional sections. And I think he has considerable personnel as well as legal sway. You obviously realize he is a strong chairman, and—

Mr. BREW. The point that you made, of course, in your testimony, when you're talking about the incumbent, yes, I don't think there's any question in terms of the incumbent. But then the question would be the next chairman or the next chairman, and whether that person would have the same personal strength.

Mr. BAUER. The answer is in our history—now, I served under three chairmen. I have not seen any of them being particularly weak. I think if we go back to the initial origins of the Board, I don't believe it was ever intended the chairman to be as strong as he is today. I think it's more or less inevitable that it did develop that way, because of the need for a strong executive. The Board sections' primary function is to deal with these cases, and the chairman certainly makes that a lot easier for us by providing a lot of extra services that if we had to do them, we could not perform our basic function. What we're proposing here is not a palace revolt. We want to continue his authority as he has exercised it in the past. However, a certain amount of trust and independence should be conceded those who are members of a final appellate authority and whose appointments are approved by the President.

Mr. BREW. On a question not related to the issue of the status of the chief members, do you find that the involvement, as Board members, do you find that the involvement of an attorney in a particular appeal sometimes makes a difference in cases that you are reviewing; and if so, what difference?

Mr. BAUER. I think it is important. I think the attorney has a very decided influence. And I assume you mean by attorney the—

Mr. BREW. Representing the claimant—

Mr. BAUER. Oh, OK, not a staff attorney—

Mr. BREW. No, no.

Mr. BAUER. The outside attorney.

Mr. BREW. That if, when you're reviewing a case, do you see a difference in a case where there's an attorney representation of the claimant?

Mr. BAUER. I would say at this point it varies from the skills of the individual attorney. I do not think the attorney population in general have developed the skills that the service organizations have. I think if attorney fees are raised, we're going to go through a transitional process, which is going to be slightly costly in that they're going to have to go through the learning process, but I see no reason in the end why they cannot very effectively represent appellants in the same manner that the service organizations do.

Mr. BREW. Final question. Do you—the three of you—personally believe that the provisions of section 4004(c) under which the Board is bound, as you know, by VA regulations, instructions of the Administrator and precedent opinions of the General Counsel, do you believe these provisions are appropriate or do you believe that the Board's authority in deciding appeals should be expanded by removing some or all of those restrictions?

Mr. BAUER. We'd obviously be bound by the laws, and the regulations. Whether you want to go down as far as the precedent decisions of the Administrator, that might be something that one would want to reconsider.

We've always complied and it's never created any serious problems, but I think it's a policy that one might want to debate and perhaps change.

Mr. BREW. That, you're saying the precedent opinions of the General Counsel. What are the instructions of the Administrator? What does that encompass?

Mr. BAUER. The Administrator will approve certain opinions of the General Counsel and those are the ones that become precedent. As far as the Administrator actually interceding personally into a case, I am not aware of that happening.

Mr. BREW. Do you have response to that?

Mr. BIERMAN. I generally agree.

Mr. BREW. Mr. Johnson?

Mr. JOHNSON. I would just like to point out one thing, Mr. Brew.

With respect to judicial review, in reading the judicial review testimony, the real heart of what the witnesses are saying is that it's not fair, or it's not appropriate that the VA can review itself. But I would suggest that there's other ways to adequately answer that question, without going all the way to judicial review in the Federal courts.

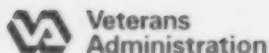
In other words, an additional answer would be taking various action to make the Board more independent. A very simple one of which would be to take the members out of senior executive service and the merit pay system. And you could consider many other things.

Mr. BREW. Understood. OK. That concludes the questions and that concludes the hearing.

Mr. BREW. I thank you very much and again I apologize for the fact that Senator Simpson and Senator Cranston weren't able to actually hear your testimony, but they certainly will review your responses to the questions and your statements.

[Whereupon, at 12:43 p.m., the committee was adjourned.]

[The following letters and other related materials were received by the committee for the hearing record:]



JUL 20 1981

Honorable Alan K. Simpson
Chairman, Veterans' Affairs
Committee
United States Senate
Washington, DC



Dear Mr. Chairman:

We respectfully request permission to submit this statement as a supplement to our written and oral testimony in connection with the hearing conducted by your Committee on July 15, 1981.

We are pleased that the Chairman, Board of Veterans Appeals, testified that he had no objection to Chief Members being legislatively exempted from the Merit Pay System. We would also point out that in his letter to the Merit Systems Protection Board he stated "there is little difference between the duties and responsibilities of Members of Board of Veterans Appeals and Administrative Law Judges." (See Exhibit (6) of our written testimony.) Similarly, the Vice Chairman stated to the Grievance Examiner that "it is my opinion that the Chief Members should be considered the equivalent of Administrative Law Judges." (See page 10 of Exhibit (5) of our written testimony.)

Since all Board Members are appointed with the approval of the President and serve on an appellate body which is charged with the important responsibility of conducting the final appellate review of veterans' claims, we clearly should have as much (and probably more) insulation and protection as Administrative Law Judges. We are firmly convinced that the Senior Executive Service and the Merit Pay and Performance Appraisal Systems greatly compromise our decisional independence - both in appearance and in fact.

We strongly support our Chairman's observation that our administrative remedies have been exhausted. Enclosure (1) to this statement explains that the proposed reorganization of the Board was unsatisfactory because it greatly impinged upon our decisional independence by adding an additional and completely unnecessary layer of supervisors between the Chairman and Associate Board Members. Enclosures (2) and (3) demonstrate that petitioning the Office of Personnel Management and the White House for a special exemption from the Merit Pay System would be futile because of the restricted nature of the statutory exemptions and the strictness with which they are interpreted. Moreover, the foregoing administrative remedies are unsatisfactory because they are not permanent with respect to the Merit Pay System and are not applicable at all with respect to the Senior Executive Service.

2.

Honorable Alan K. Simpson

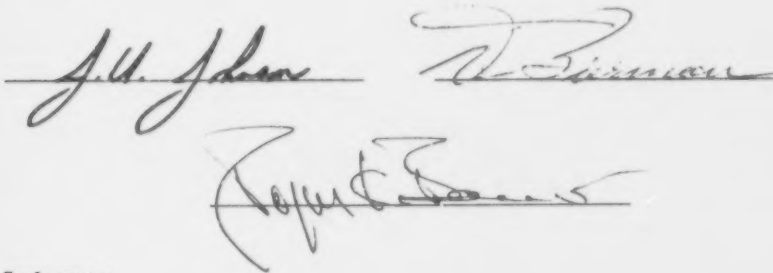
We believe that legislation is the best and only permanent solution to our concerns about decisional independence. Because of increasing morale problems, it is our hope that legislative relief will be forthcoming in the near future. Our proposed amendment not only would protect Board Members from current "bonus-rating" systems (such as the Senior Executive Service and the Merit Pay System) but also from any future systems of that type. The language of our proposed amendment has protected Administrative Law Judges for many years. Because of that long history, the meaning of the language is clear and well understood.

Enclosure (4) is a detailed list of additional staff and administrative duties performed by Chief Members. It is true that Chief Members have significant responsibilities, but we wish to emphasize that many of the additional duties performed by Chief Members are judicial in nature (as distinguished from supervisory in nature).

Enclosure (5) is a table which shows the relationship between Section production and Section jurisdiction. Following the oral testimony of Mr. Bierman, Mr. Brew requested that these data be submitted to the Committee. This table supports our contention that performance standards under Merit Pay are unfair, unrealistic and readily lend themselves to manipulation.

We request that this letter and enclosures (1) through (4) be printed in the record following our written testimony and attached exhibits. In addition, we request that enclosure (5) be printed in the record at the point where Mr. Brew requested the data.

Sincerely,



Three handwritten signatures are present. The first signature, 'J.H. Johnson', is written over a horizontal line. To its right is another signature, 'T. Bierman', also over a horizontal line. Below these two, centered, is a third signature, 'Robert B. Brew', which is more stylized and also over a horizontal line.

Enclosures:

[ENCLOSURE 1]

NEVER MAILED, BECAUSE REORGANIZATION PLAN WAS WITHDRAWN AFTER PROTEST

Mr. Edward P. Scott
General Counsel
Senate Veterans' Affairs Committee
Russell Senate Office Bldg., Suite 414
Washington, DC 20510

Dear Mr. Scott:

The purpose of this letter is to request another appointment with you in order to explain our concern with the continued efforts to change the longstanding basic structure of the Board of Veterans Appeals in ways which we believe will compromise the decisional independence of the Board Members and Board Sections. Some weeks ago you kindly met with several Board Members and thereby encouraged all of us in our efforts to have Chief Members exempted from inclusion in the Performance Appraisal and Merit Pay Systems. Since that meeting, several disconcerting events have transpired:

a. The Examiner appointed to conduct an inquiry into the Chief Members' formal grievance concluded that Chief Members are subject to inclusion in the Merit Pay System because, at least in a technical sense, they are "supervisors" as defined by the Civil Service Reform Act of 1978.

b. However, the Examiner recommended to the Deputy Administrator that because of the Board's adjudicative functions and because of "valid equitable arguments" certain "appropriate steps" should be undertaken (alternatively or concurrently) to provide an exclusion for Chief Members.

STEP ONE: Investigate the "feasibility of converting 'chief member' to a title carrying only the responsibilities related directly to the adjudicative process."

STEP TWO: Have the Administrator (as the agency head) make application to the Office of Personnel Management for an exclusion pursuant to 5 USC 5401(b)(2).

c. On August 8, 1980, the Deputy Administrator advised the Chief Members in writing that he was adopting the Examiner's recommendations. He stated that the Chairman, Board of Veterans Appeals, "will explore the feasibility of removing supervisory duties from (Chief Members) and assigning them elsewhere." He further stated if the Chairman determines that such reassignment of duties is not feasible, then he (the Deputy Administrator) will "recommend to the Administrator that application be made pursuant to 5 USC 5401(b)(2)(C) for exclusion from merit pay coverage."

d. Since the receipt of the Deputy Administrator's decision, we have been advised orally by the Chairman and Vice Chairman that there is no current plan to seek an exclusion for Chief Members from the Office of Personnel Management, and that effective October 1, 1980, the Chief Members will become a part of the Merit Pay System and remain in that status while the reorganization plan is being worked out and processed for approval and implementation.

e. The Chairman's reorganization plan (which was drawn up and forwarded to the Deputy Administrator without any opportunity for submission of recommendations or suggestions by Associate Members) calls for the establishment of four separate Appellate Services. Each Service is to be headed by a Deputy Vice Chairman who will be in the Senior Executive Service. Each Deputy is to have supervisory control and authority over four Board Sections. We are very concerned because the Deputies' supervisory authority is to extend not only to the attorney staff, but also to Board Members. In response to our specific request, a copy of the proposed Position Description pertaining to the Deputy Vice Chairmen was made available to us for examination in the Chairman's Office.

f. Based on several discussions and on our review of the proposed Position Description, it is very clear that the Deputies' authority with respect to both the attorney staff and Board Members is to be wide-ranging as is in keeping with membership in the Senior Executive Service. However, we have been told that this reorganization will be very good for the Board because it will provide additional upward mobility for some Board Members and also result in decisions of a higher degree of quality and uniformity.

Upward mobility is not a primary concern for most of the Board Members. Our chief concern is independent decision making. During the course of the grievance procedure, both the Chairman and the Vice Chairman conceded that our duties and responsibilities as Board Members are closely analogous to those of an Administrative Law Judge. Of course, the very cornerstone of the A.L.J. Program is independence - both in appearance and in fact. Therefore, it is not at all clear to us why, after all these years, Board Members suddenly need such close supervision. We are very proud of the fact that Title 38 requires appointments to the Board must be approved by the President. We believe that this statutory provision constitutes the clearest possible evidence that Congress intended our decisional independence to remain completely unfettered except, of course, for the provisions of 38 USC 4004(c).

The proposed reorganization plan leaves unresolved one of the basic concerns discussed in the Chief Members' grievance. In the grievance petition it was emphasized that under the Merit Pay System too much authority would accrue to the Chairman and Vice Chairman and that such accrual could not help but compromise our decisional independence because the power of financial reward (or the withholding thereof) carries with it an inherent capacity to exercise a very strong influence. With equal validity, it can also be said that the power to use four surrogates to look over someone's shoulder all day carries with it an inherent capacity to exercise a very strong influence! We believe that such a pervasive form of supervision (and essentially undefined supervision at that) is undesirable, inappropriate, and therefore not necessary. In point of fact, because they will retain their membership on the Board, three of the Deputy Vice Chairmen could, with the cooperation of the Chairman or Vice Chairman, overrule any proposed decision made at the section level. Clearly our decisional independence would be compromised - certainly in appearance and very likely in fact.

In addition to the factors discussed above, there are several legal reasons why we are in opposition to the proposed reorganization. Title 38, Section 4001, provides that the Board shall consist of a Chairman, Vice Chairman, and not more than 50 Associate Members. Section 4002 provides that the Chairman may divide the Board into Sections of three members and designate one of the Section Members to serve as Chief. We believe the proposed reorganization is contrary to the clear provisions of the law in the following respects:

- a. There is no provision in the law for Deputy Vice Chairman. Even more legally significant, the extensive supervisory authority invested in the four Deputies would certainly make them more than our "associates" and thus be contrary to the letter, intent, and spirit of Title 38.
- b. The proposed reorganization cannot help but result in the phasing out of Chief Members. This is of questionable legality because the Chief Member position is specifically provided for in Title 38.
- c. It is our understanding that the Deputies' authority may even extend to reassigning Board Members from one section to another. Section 4002 clearly names the Chairman as the person who is to exercise such authority.

d. During the 1981 fiscal year we will drop from 16 Sections down to 15 Sections, apparently because of budgetary constraints. However, for the 1982 fiscal year it is planned that we will return to 16 Sections. This raises an interesting legal and mathematical question. How can we have 16 three-member sections and four Deputies and still remain within the mandated limit of 50 associate members? We do not believe that Congress intended for some of our Sections to operate with less than three members on a permanent basis.

In conclusion, we wish to emphasize that there are two basic common sense reasons why the proposed reorganization is undesirable:

a. The main problem at the Board of Veterans Appeals is a tremendous case load - not unreliable Board Members who require close daily supervision. It just does not make good sense to assign four Board Members to perform essentially unnecessary supervisory duties when there is a real and compelling need for them to be "on the line" reviewing and disposing of appeals.

b. If the proposed reorganization is implemented, it will result in a total of six members of the Board being in the Senior Executive Service: The Chairman, Vice Chairman, and four Deputy Vice Chairmen. We believe this is highly inappropriate because many of the arguments we have made against the Merit Pay System apply with equal or even greater force to the Senior Executive Service. We are all quasi-judicial officials - not supervisors, not senior executives!

We regret that this letter is so long, but we felt it was important for us to demonstrate that there are good, solid reasons for our concern and apprehension about the proposed reorganization, particularly since it is being put forward as a solution to the Chief Members' grievance. As proposed, the reorganization goes well beyond what the Grievance Examiner recommended and at the very same time falls far short of resolving some of the basic concerns addressed in the Chief Members' grievance petition.

One of us will be in touch with your secretary in the next few days. We hope you can find the time to meet again with two or three of us. We would like to discuss possible solutions to our predicament, including legislative action such as an amendment to Title 38 to make our positions analogous to Administrative Law Judges and thus beyond the reach of either the Merit Pay System or the Senior Executive Service. Two current examples of succinct statutory language which would accomplish this goal are set forth in 5 USC 5372 and 41 USC 607(b)(1).

We sign as representatives of the overwhelming majority of all Board Members, including Chief Members, Legal Members, and Medical Members.

Sincerely,

D. T. LANDERS
Chief Member
389- 2255

J. J. BUTLER
Chief Member
389-3117

D. J. B. BIERMAN
Chief Member
389-2067

J. U. JOHNSON
Legal Member
389-2238

RAE, T. WOOD
Chief Member
389-2160

CC: Deputy Administrator
Assistant Administrator
for Personnel
Chairman, BVA

POSITION DESCRIPTION FOR DEPUTY VICE CHAIRMAN (Outline)

A. He/she is head of an appellate service comprising several sections of the Board. Etc., etc.

(1) Providing policy guidance to all associate board members in the particular appellate service.

(2) Being directly responsible for the direction and supervision of the professional and administrative activities of the Appeals Board Sections and the supporting consultant staff comprising the particular appellate service.

(3) Being responsible for the continuous supervision over the quality and quantity accomplishments in the Sections as well as identifying the professional and managerial/training needs. Through the Special Assistant (Administrative) insures that appropriate training programs are implemented and evaluated as to effectiveness.

(4) Resolving problems within and among Board Sections regarding interpretation of law and Board procedures and operations.

(5) Conferring with top staff and department officials of the Veterans Administration and other governmental agencies, individual members of Congress, and officials of the veterans' organizations. The incumbent's contacts with the individuals and groups can influence the programs enacted by Congress and administered by the Veterans Administration.

B. With the Chairman and Vice Chairman, the incumbent is a member of the Board's policy-making team. Etc., etc.

C. The incumbent is responsible for the supervision of the Appellate Service. He/she will recruit, hire, assign all personnel within the Appellate Service. Similarly, the incumbent will be responsible for any adverse or disciplinary actions or counseling of employees in the service.

D. Quality Review duties, etc., etc.

E. Supervises an Appellate Service consisting of up to 15 Associate Board Members, GS-15; a staff of Attorney-Advisers ranging in grades from GS-9 to GS-14; and a staff of Administrative Aids, GS-7. Evaluates the performance of all attorney-advisers assigned to him/her at quarterly intervals. Evaluates the performance of Associate Board Members, Attorneys/Paralegals, and his/her supervisory responsibilities; approves promotions and other personnel actions.

UNDERSCORING ADDED

[ENCLOSURE 2]

9/17/80

TO: Chief Members

I telephoned several very helpful HHS (formerly HEW) and OPM officials who gave me the following information:

a. The request from the Social Security Council for an exemption from the Merit Pay System never reached the Office of Personnel Management. This is because the secretary of the then HEW refused to endorse the request! (The exemption request must come from the agency head.) You may recall that we were hoping to use the Social Security Council as a test case for our own situation.

b. Office of Personnel Management has received a total of six (6) requests for exemptions and forwarded them all to the White House. Five (5) requests are based on the argument that the agency involved is too small for effective implementation of the Merit Pay provisions. 'No, we can not make that argument ourselves because we are part of the VA.)

c. An official of the Office of Personnel Management further advised me: (1) that the exemption provisions of the law are considered to be "rather narrow"; (2) that an exemption based on quasi judicial functions would be "breaking new ground"; and (3) that it is surprising how many people in government perform such functions. This particular official knew a great deal about the BVA; she became very vague when I asked her how she obtained this information. My guess is that Central Office personnel types had already called her and asked her essentially the same questions.

J. U. J.

P.S. Attached for your review are pertinent excerpts from Title 5, U. S. Code.

[ENCLOSURE 3]

92 STAT. 1180

PUBLIC LAW 95-454—OCT. 13, 1978

"CHAPTER 54—MERIT PAY AND CASH AWARDS

"Sec.

"5401. Purpose.

"5402. Merit pay system.

"5403. Cash award program.

"5404. Report.

"5405. Regulations.

545c "§ 5401. Purpose

"(a) It is the purpose of this chapter to provide for—

"(1) a merit pay system which shall—

"(A) within available funds, recognize and reward quality performance by varying merit pay adjustments;

"(B) use performance appraisals as the basis for determining merit pay adjustments;

"(C) within available funds, provide for training to improve objectivity and fairness in the evaluation of performance; and

"(D) regulate the costs of merit pay by establishing appropriate control techniques; and

"(2) a cash award program which shall provide cash awards for superior accomplishment and special service.

5 USC 7103.

"(b) (1) Except as provided in paragraph (2) of this subsection, this chapter shall apply to any supervisor or management official (as defined in paragraphs (10) and (11) of section 7103 of this title, respectively) who is in a position which is in GS-13, 14, or 15 of the General Schedule described in section 5104 of this title.

Exclusions.

"(2) (A) Upon application under subparagraph (C) of this paragraph, the President may, in writing, exclude an agency or any unit of an agency from the application of this chapter if the President considers such exclusion to be required as a result of conditions arising from—

→ "(i) the recent establishment of the agency or unit, or the implementation of a new program,

→ "(ii) an emergency situation, or

→ "(iii) any other situation or circumstance.

Presidential reports transmitted to Congress.

"(B) Any exclusion under this paragraph shall not take effect earlier than 30 calendar days after the President transmits to each House of the Congress a report describing the agency or unit to be excluded and the reasons therefor.

Filing of applications.

"(C) An application for exclusion under this paragraph of an agency or any unit of an agency shall be filed by the head of the agency with the Office of Personnel Management, and shall set forth reasons why the agency or unit should be excluded from this chapter. The Office shall review the application and reasons, undertake such other review as it considers appropriate to determine whether the agency or unit should be excluded from the coverage of this chapter, and upon completion of its review, recommend to the President whether the agency or unit should be so excluded.

"(D) Any agency or unit which is excluded pursuant to this paragraph shall, insofar as practicable, make a sustained effort to eliminate the conditions on which the exclusion is based.

Review.

"(E) The Office shall periodically review any exclusion from coverage and may at any time recommend to the President that an exclusion under this paragraph be revoked. The President may at any time revoke, in writing, any exclusion under this paragraph.

[ENCLOSURE 4]

CHIEF MEMBERS ADDED RESPONSIBILITIES

1. Presides over hearings.
2. Moderates section discussion on decisions.
3. Conducts pre hearing conferences.
4. Reviews all reconsideration requests and suggests appropriate action.
5. Develops basic responses to problem correspondence.
6. Serves as chairman of the various Board committees, awards, training, select cases, etc.
7. Meets routinely with Chairman and Vice Chairman on Board policy formulation and enforcement.
8. Assigns cases to section staff based on difficulty of case and attorney's experience.
9. Manages section back log and stale case procedures.
10. Oversees section employee activities and schedules time to be allotted.
11. Responsible for Outside Medical Opinion requests.
12. Is section spokesman, on all matters, with other government and agency officials.
13. Responsible for ensuring transcripts reflect actual content of the hearing.
14. Evaluates section staff and makes recommendations as to promotions, discipline, etc.
15. Is responsible for overseeing all employee annual and sick leave within the section.
16. Oversees all in section training.
17. Assigns and oversees special projects and research of staff attorneys.

JUN 19 1981

June 15 1981

Honorable Alan K. Simpson
Chairman, Veterans' Affairs Committee
United States Senate
Washington, D.C. 20510

Dear Senator Simpson:

It is our understanding that your Committee is scheduled to conduct hearings in mid-July on V.A. adjudication procedures, including the issue of whether 38 U.S.C.4001(b) should be amended to exempt members of the Board of Veterans Appeals from those provisions of the Civil Service Reform Act of 1978, which pertain to the Senior Executive Service and the Merit Pay and Performance Appraisal Systems. We, the undersigned retired Board Members, respectfully request that this letter be made a part of the official hearing record.

We are proud to have served the Board for many years and our retirement has not lessened our strong interest in protecting the reputation and integrity of the Board. We are firmly convinced that the Board's highly prized decisional independence has been greatly compromised by the inclusion of the Chairman and Vice Chairman in the Senior Executive Service and the Chief Members in the Merit Pay and Performance Appraisal Systems.

We fully support the amendment to Title 38 proposed by our former colleagues. Since we are now retired and have nothing to gain one way or the other, we can state with a high degree of authority that it would be unfair and completely inaccurate to look upon the proposed amendment as an unwarranted attempt to evade needed supervisory control. On the contrary, in order to do the very best job for the veterans it serves, it is extremely important that the Board's decisional independence be carefully protected from all unnecessary encroachments.

Sincerely,

EDWARD AFFIN
4409 BURLINGTON PL NW
WASHINGTON DC 20016

*Edward Affin
Chairman, Board of Veterans Appeals
25 years as a member*

*As the Board should have the status of
a Court, as was first proposed in 1935 &
1946.*

CAMERA COPY—OFFSE.



Motto: "If I cannot speak good of my comrade, I will not speak ill of him."

DISABLED AMERICAN VETERANS

NATIONAL SERVICE and LEGISLATIVE HEADQUARTERS
807 MAINE AVENUE, S.W.
WASHINGTON, D.C. 20024
(202) 554-3501

July 6, 1981

Honorable Alan Simpson
Chairman
Senate Veterans Affairs Committee
410 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Simpson:

This is in reference to your Committee hearings that have been scheduled for July 15, 1981, wherein you intend to give consideration to matters (and legislation) pertaining to the Veterans Administration's Adjudication of Claims Process.

As you are aware, the Disabled American Veterans will be unable to appear during this hearing, as all of the staff here at DAV National Service and Legislative Headquarters (including the undersigned) shall be in Bal Harbour, Florida, in order to conduct the business of our 1981 National Convention.

I have discussed this fact with Mr. Bill Brew, a member of your Committee staff, and he has graciously consented to receive any comments we may care to make for placement in the Hearing Record. Please consider this letter (and attachment) in that regard.

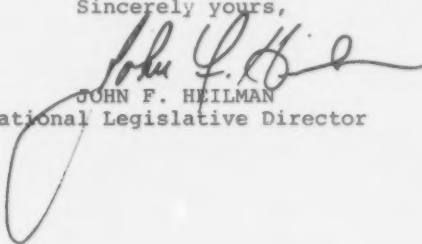
Mr. Brew has informed me that during the July 15th hearing S. 349, the Veterans Administration Adjudication Procedure and Judicial Review Act of 1981, will be the pending legislation. Examination of this measure reveals that it is identical to S. 330, a judicial review bill that was given lengthy consideration by the Senate Veterans Affairs Committee in 1979. Having been a member of the Committee at that time, you, of course, recall this and the fact that S. 330 was passed by the full Senate on September 17th of that year and referred to the House of Representatives. S. 330 received no favorable action by the House in 1979 (or in 1980.)

You may also recall that the Disabled American Veterans did testify during that 1979 hearing. Since the pending bill S. 349 is identical to S. 330, and since our views on the legislation

Honorable Alan Simpson
July 6, 1981
Page 2

remain unchanged, the testimony we presented to the Committee in 1979 applies today. To reacquaint you and your Committee with our views I have attached that testimony to this letter. I respectfully request that you incorporate it into the Hearing Record on S. 349.

Sincerely yours,



JOHN F. HEILMAN
National Legislative Director

JFH:dd

Enclosure

STATEMENT OF
JOHN F. HEILMAN
NATIONAL LEGISLATIVE DIRECTOR
DISABLED AMERICAN VETERANS
BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS

UNITED STATES SENATE

FEBRUARY 22, 1979

JULY 15, 1981

Mr. Chairman and Members of the Committee:

On behalf of the ^{697,011}~~600,000~~ members of the Disabled American Veterans, may I say that we appreciate this opportunity to present our views on Senate Bill S ³⁴⁹~~320~~, the Veterans Administration Adjudication Procedure and Judicial Review Act of 197⁸~~9~~.

~~Culminating two years of study and examination which began in the First Session of the 95th Congress,~~ The various provisions of S ³⁴⁹~~320~~ propose certain statutory changes in Title 38, U. S. Code, changes which purport to insure that the full "due process of law" shall be made available to all those who may seek to establish entitlement to benefits and services administered by the Veterans Administration.

Essential to this goal, and contained in Title III of the pending legislation, is a proposal that would subject adverse VA benefit determinations to a "judicial review process" outside the Agency itself. As you know, under current law, most VA benefit determinations (the exception being decisions relating to the insurance and home loan programs) are final and conclusive and not subject to review by any other official or court in the United States (Section 211(a) Title 38, U. S. Code).

Mr. Chairman, in accordance with a resolution approved by the delegates to our most recent National Convention, the Disabled American Veterans is in agreement with the primary thrust of S ³⁴⁷~~330~~. That is, we do believe that a veteran, or the dependent or survivor of a veteran, whose claim has been denied in the VA appellate process should be able to seek further redress in judicial proceedings outside the Veterans Administration.

Having stated our agreement with this fundamental aspect of S ³⁴⁷~~330~~, I must add that the DAV does find itself to be in disagreement with certain specific provisions of the bill. Our disagreements range from slight or moderate differences of opinion to unqualified opposition.

In setting forth our views on S ³⁴⁷~~330~~, I shall deal with the bill in chronological discussion of its four major titles.

TITLE I

Collectively, the various provisions of Title I of the bill are designed to codify certain existing regulations, policies and procedures relative to VA benefit claims action which occurs at the local Regional Office level, after an appeal (Notice of Disagreement) has been filed, and continuing in the appellate process up to and including action by the Board of Veterans Appeals (BVA). Title I would also allow for the provision of certain new, additional appellate procedures and adjudicative courses of action.

Mr. Chairman, codifying existing regulations, policies and procedures relative to the VA appellate process would obviously cover this process with the mantle of statutory protection. We have no objection to this. We are also favorably disposed to the broadening

- 1A -

of appellate courses of action at the pre-BVA level for those claimants who disagree with VA benefit decisions. However, we do offer the following comments and suggestions relative to specific sections of Title I:

Section 101 would add a new Section 3007, entitled Burden of Proof; Reasonable Doubt, to Chapter 51, Title 38, U. S. Code. We suggest that the language in Section 3007(b) be amended in part to read, "...a reasonable doubt exists regarding the merits of a claim for any benefit under laws, regulations, procedures and policies administered by the Veterans Administration...."

We propose the addition of the underscored words to insure that the codified doctrine of "reasonable doubt" could not be construed by anyone to mean that it is for application in the narrowest of senses, that is, applicable to only the statute itself and not to existing or ensuing regulations, procedures, policies, etc. which flow from the statute.

An example is in order:

If the medical evidence of record in a claim for an increased service-connected disability rating leaves a "reasonable doubt" as to the applicability of one of two percentage evaluations (according to the VA's Schedule for Rating Disabilities), then the higher of the two evaluations shall be assigned. The authority for making an adjudicative decision such as this is not presently contained in Title 38, U. S. Code, however, it is delineated in CFR, Title 38, Sections 4.3 and 4.7.

If the doctrine of reasonable doubt is to be codified - and we believe that it should be - then it should be statutorily clear that the doctrine is to have the broadest of applications.

Section 103 of the bill proposes to amend Section 4001, Title 38, U. S. Code, Composition of the Board of Veterans Appeals, to increase the membership of the BVA from its current maximum figure of 50 to a new maximum figure of 65. This increase in membership is proposed in order to enable the BVA to handle the increased workload which is anticipated to result from the enactment of S ³⁴⁷ 330.

Should judicial review be enacted into law, we very definitely believe that BVA membership will be in need of expansion. In fact, it is our opinion that the BVA is currently understaffed, that it is hard pressed to properly handle existing workloads and that this has detracted from the quality and extent of consideration that should be given to each individual appeal.

~~In a recent response to questions asked by Ray Roberts, Chairman of the House Veterans' Affairs Committee, the VA Administrator indicated that in Fiscal Year 1978, the average appeal remained at the BVA for a period of 122 calendar days - some four months. He further stated that the timeliness standard he has established for a satisfactory level of BVA appeal processing is 75 days. According to the Administrator:~~

~~"...if the Board could hire 75 qualified employees during the next 18 months, it would be theoretically possible... to place the (desired) response time of 75 days within easy reach..."~~

Therefore, in view of the existing, heavy BVA workload and the increase anticipated due to enactment of judicial review legislation, we recommend that Section 103 of the bill propose to authorize a maximum BVA membership of 125 personnel.

Section 107 would amend Section 4005 Title 38, U. S. Code, giving the VA Administrator discretionary authority to provide a new level of redress in the VA appellate process, after the original Notice of Disagreement has been filed and Statement of the Case issued, but before the appeal is forwarded to the BVA in Washington, D. C. This new appellate procedure would include the right of a claimant to request a hearing by an "impartial panel" of three VA employees and following the decision of this panel, if required, the issuance of a second Statement of the Case. The Administrator may institute the new appellate procedure in the form of a "pilot program" in one or more limited geographical areas.

We find nothing inherently wrong with providing an additional level of appellate redress at the local VARO. However, if this new level of redress is thought to be desirable, then the language of the draft bill should be amended to direct the Administrator to establish this procedure, as opposed to leaving it to his discretion.

We believe it should be noted at this point that the additional adjudicative procedures proposed in Section 107 would very definitely require additional personnel in the VA's Department of Veterans' Benefits (DVB). The Committee anticipated the need for increased personnel in Section 103 of the bill (relative to the BVA) and, though providing funds for increasing local adjudicative personnel is an appropriations matter, we believe the Committee should note in its analysis of Section 107 that additional DVB personnel would very definitely be required.

Relating to a subject not addressed in Section 107, may I say that the DAV has long felt that travelling boards composed of local VARO adjudicative personnel should be used with more frequency by the

VA. Such travelling boards are now used by some field stations and we find that it greatly expedites and enhances the claims process from both the VA's and the claimant's standpoint.

We therefore believe that Section 107 of the bill would be an appropriate place to statutorily require the VA to make regular use of travelling boards composed of VARO adjudicative personnel. In connection with this, we also feel that such travelling boards should be regularly sent to VA Medical Centers (for hearing purposes) where the actual examining physician could be more directly involved in the claims decision making process. This would be valuable in cases involving complex medical questions - special monthly compensation cases, for example.

We would also like to see language in Section 107 which would authorize "informal hearings", requested by a claimant's accredited representative, wherein the claimant need not necessarily be present. This practice is now used in some VAROs and we find it to be a valuable, informal tool in the claims process.

Section 109 would amend current law to provide certain procedural rights in proceedings at the VARO and BVA levels.

We believe that in paragraph (b) of the proposed new Section 4010 entitled, Adjudication Procedures, the language should require the Administrator to receive and consider all evidence submitted by claimants and/or their representatives and that any decisions made relative thereto should be subject to judicial review.

We view all the provisions of the new proposed Section 4010(c) as beneficial to the claimant (in pursuing his claim) but offer a word of caution that implementation of these procedures should not

detract from the present informality and non-adversarial nature of VA proceedings.

In this regard, we specifically refer to the claimant's right to serve "interrogatories" as proposed in Section 4010(c)(6).

The language of the bill would allow such interrogatories to be served on any person - VA and nonVA personnel alike - who has contributed in a material way to the proceedings of a claim. We ask the Committee to consider the question, "Would such interrogatories, and the possible use of a VA subpoena powers to elicit answers to such interrogatories, inhibit or detract from the cooperation of the private medical community in VA proceedings?" As you know, independent medical opinions and private physicians' statements are very much a part of the evidence of record in many VA claims.

In the proposed Section 4010(d) we assume, and recommend an appropriate language change if this assumption is not correct, that a claimant's accredited representative is included as a "party" who can request the disqualification of a VA employee from participating in claims proceedings. We also believe that such requests should be made applicable to both appellate and pre-appellate adjudication proceedings.

We recommend that the proposed new Section 4011 entitled, Notice of Procedural Rights, contain language to the effect that all procedural right notices to claimants shall be "clear and evident" and that such notices shall specifically inform claimants of their right to obtain assistance and representation from service organizations.

Title II

Title II of the bill proposes to require the VA to comply with certain rule making procedures presently contained in Section 553 of Title V, U. S. Code (provisions of the Administrative Procedure Act). These procedures presently require all Federal agencies to publish rule and regulation proposals and changes in the Federal Register, conduct public hearings with respect to same and to solicit the opinions and comments of any interested party.

Mr. Chairman, for some time the VA has been voluntarily complying with the provisions of Section 553 of Title V, U. S. Code. However, we do agree that the VA should be statutorily required to do so and we therefore support this provision of the bill.

Title III

Title III of the bill would amend Title 38, U. S. Code by adding a new Chapter 72 entitled, JUDICIAL REVIEW. The provisions of this Chapter would allow for review of adverse VA benefit determinations (excepting those under Chapters 19 and 37 Title 38, U. S. Code) through civil actions in the Federal court system, after all appellate courses of action (in the Agency) have been exhausted by a claimant.

Mr. Chairman, as stated earlier, in accordance with a mandate of our most recent National Convention delegates, the Disabled American Veterans does support the concept of judicial review - further redress of claims denied in the VA appellate process by a court or entity outside the Veterans Administration itself.

When considering the propriety of the current VA adjudication process it must be noted that it is not "adversary" in nature. That

is to say, the VA seeks to grant rather than deny benefits if entitlement is at all possible under existing laws, rules and regulations. An objective analysis of VA benefit determinations would most likely reveal that, by and large, they are being made by competent, dedicated personnel in a fairly equitable fashion.

However, it must also be noted that a VA claim is a claim against the Veterans Administration, and that the merits of a claim are evaluated by the Agency itself. The VA then performs the multiple role of defending itself against a claim, in some instances representing the claimant in the prosecution of the claim and, in all instances, judging the claim which it is also defending itself against.

Clearly, the goal of insuring the most equitable consideration of claims filed by veterans, their dependents and survivors requires that adverse decisions rendered by the VA should be subject to the oversight procedure afforded by a judicial review process.

However, Mr. Chairman, the delegates to our most recent National Convention have not mandated the DAV to seek judicial review as proposed by S ³⁴⁹~~339~~ - placing such review in the Federal District Court system.

The official position of the DAV is in support of judicial review through the creation of an independent, permanent court - "a Court of Veterans Appeals" - composed of judges appointed from civil life by the President, such appointment being consented to by the Senate.

This court would have exclusive jurisdiction to review benefit claims upon their final denial by the Board of Veterans Appeals and would have the authority to confirm, reverse, modify or otherwise

change such BVA decisions. Review of VA claims and actions associated with such a review would be the sole duty and responsibility of the Court.

The Court would also be empowered to (1) determine and allow reasonable legal fees in cases where the claimant is represented by a private attorney and (2) prescribe the qualifications of persons who may represent claimants in proceedings before the Court.

Mr. Chairman, we feel that our proposal for the creation of an independent Court of Veterans Appeals would provide a more equitable, efficient judicial review process than would the method proposed by the pending bill.

As you know, one valid complaint relative to the VA claims process is that the rating authorities located in the 57 VA Regional Offices across the country are lacking in decision uniformity. That is, depending upon the geographic location of the Rating Board, very similar claims will receive quite dissimilar adjudicative decisions.

It is our opinion that a single Court of Veterans Appeals would promote decision uniformity within the VA adjudication process much more expeditiously than would the 94 District Courts which presently make up the Federal judicial system. Indeed, it is proper to ask if the 94 separate Federal District Courts would find it difficult to achieve uniformity in their own decision making process.

Secondly, we believe that litigation of veterans' claims in the Federal District Court system would be much more time consuming and costly to the claimant than in a Court of Veterans Appeals, whose dockets would have no other obligations.

There is no denying that Federal courts are crowded and overburdened at the present time. In Fiscal Year 1978, over 90,000 civil cases were handled by the 94 Federal District Courts. The median time involved from claim filing to disposition was nine months per case. At the two extremes, the interval ranged from a short two month period to a lengthy 28 months. The disposition of Social Security appeals whose issues are somewhat similar in nature to those of VA claims, ranged from three to eighteen months, with a median eight month period.

Undoubtedly, the addition of 4,000 to 5,000 VA appeals would increase the burden on our Federal courts and not insignificantly increase the above mentioned claim disposition period.

We also believe that the smaller size and restricted responsibility of a Court of Veterans Appeals would promote, more rapidly and to a greater degree, an expertise in the handling of VA claims which could not be matched by the Federal court system - hence the assurance of the most equitable redress of claims.

Finally, Mr. Chairman, I wish to point out that under the DAV proposal a claimant could still retain a representative of a service organization as his counsel if he chose to do so. S-³⁴⁷~~330~~, by placing judicial review in the Federal court, would in fact bar VA claimants from continuing to use the free, competent service organization representation that is now available to them (most service organization representatives are not attorneys and therefore not licensed to practice in a Federal court).

In recent years, over 80% of BVA claimants have had service organization counsel, the balance have had either no representation or the representation of private attorneys and other agents.

Certainly the option to retain or to continue to use service organization counsel should be available to all veterans who may wish further redress of their claims. As indicated earlier, the DAV judicial review proposal carries no private attorney fee restrictions such as presently apply to representation in VA proceedings. Therefore, an "unencumbered" (by fee restrictions) choice of counsel would be given in all appealed cases.

For the above reasons we trust this Committee will agree that a Court of Veterans Appeals would provide for judicial review in the most expeditious, equitable manner. We have prepared a detailed legislative draft of our proposal and we would be pleased to submit it to the Committee for study and consideration.

TITLE IV

Title IV of the bill proposes to amend Section 3404 Title 38, U. S. Code, thereby modifying the current \$10 fee limitation that presently applies to private attorney representation in VA proceedings.

Under the terms of the bill, the \$10 fee limitation would stay in effect for any private attorney representation that occurs prior to a claimant filing an appeal (Notice of Disagreement) with a VA decision. For private attorney representation in VA proceedings, after an appeal has been filed at the local Regional Office level and continuing up to and including representation at the Board of Veterans Appeals, the Administrator may determine and approve payment of legal fees by the claimant in an amount that shall be limited to \$500 - except that a higher amount, including a 25% contingency agreement made by the claimant and attorney, may be authorized if the Administrator feels that circumstances so warrant. An unfavorable

decision rendered by the VA would not preclude the payment of "reasonable attorney fees".

Payment of attorney fees for favorable representation in the Federal District Court system would be subject to the review of the Federal Court itself. There is no maximum dollar limitation set, though the bill does provide that in the event of a contingency agreement between the claimant and the attorney, the fee shall not exceed 25% of any past-due benefits awarded.

Under the bill, all fee determinations, whether rendered by the Administrator or the Federal District Court, shall be subject to "judicial review" if appropriate action is brought forth by either the claimant or the attorney.

Mr. Chairman, the DAV has no objections to the payment of reasonable fees by a claimant for private attorney representation that occurs in judicial review proceedings - whether such judicial review occurs in the Federal District Court system as proposed by S ³⁴⁹~~336~~, or in an independent Court of Veterans Appeals as proposed by our organization.

However, the DAV is adamantly opposed to the removal or modification of the present fee limitation that applies to representation in VA proceedings. A resolution to this effect was unanimously approved by the delegates to our most recent National Convention.

Mr. Chairman, the current \$10 fee limitation was set more than 100 years ago, at a time when Civil War veterans filing for Federal benefits were easy prey for "unscrupulous" attorneys and other agents. And, of course, a \$10 fee in 19th century America was more than likely quite commonplace and considered acceptable (for a variety of services) by the legal profession.

These are facts Mr. Chairman and we do not dispute them. They are often cited by the proponents of VA fee limitation removal/modification who exclaim, "Times have changed". We assume that by this they mean (1) unscrupulous attorneys no longer pose a threat to VA claimants and (2) \$10 can hardly be considered proper recompense for legal services.

The DAV essentially agrees with point number one. Though some attorneys might willfully and intentionally attempt to charge veteran claimants fees far in excess of the value of legal services actually rendered, more than likely, a majority would not (this does not negate the fact that VA benefit dollars would be diverted from veteran claimants into the pockets of private attorneys).

We also concede the validity of point number two. A \$10 legal fee in the 1970s has gone the way of a good "five-cent cigar".

Yes, times have changed, and we believe it is precisely this fact that argues most well for retention of the present attorney fee limitation.

One hundred years ago, if a veteran desired competent assistance and representation in securing a Federal benefit based upon his military service, the primary, perhaps sole source of such representation was a private attorney.

Today's veteran can avail himself, free of charge, of the competent advice, assistance and counsel of hundreds upon hundreds of accredited representatives of a multitude of veteran service organizations. Located in every state of the union in every VA Regional Office, the "service officers" of the major veterans organizations have represented literally millions of VA claimants since World War I, securing for them hundreds upon hundreds of millions of dollars in VA benefits and services.

The service officer of the DAV, American Legion, VFW, Amvets, etc, are not voluntary workers, but paid professionals, trained in VA law and completely familiar with the entire VA system of benefits and services. They are veterans themselves - in the case of the DAV, disabled veterans - which gives them an identity and empathy with their claimants that is an invaluable aid in the successful performance of their role as a veteran advocate.

Authorization of modern day legal fees for private attorneys representing veterans in a judicial review process is one thing. Opening up a new, lucrative practice of law by allowing private attorneys to enter the VA adjudication process - when there is already in existence a nationwide system of free, competent legal counsel - is another.

And, Mr. Chairman, there exists ample evidence in support of our contention that service organization representatives are every bit as competent as private attorneys (in VA proceedings). Let us examine statistical data from the VA's Board of Veterans Appeals (Addendum to this Statement).

In Fiscal Year 1972 a total of 29,723 appeals were reviewed by the BVA. Of that figures, 6,770 (22.8%) had no representation; 22,382 (75.3%) had service organization counsel; and 571 (1.9%) were represented by private attorneys or other agents.

In those appeals in which there was no representation, there was an allowance rate by the BVA of 10.9%; private attorneys/agents had an allowance rate of 13%; and service organizations had an allowance rate of 13.1% (the DAV allowance rate that year was 14.7%).

I might also add that in Fiscal Year 1972, 88 (15.4%) of the 571 claims presented to the Board of Veterans Appeals by private attorneys/agents were "remanded" back to the local rating authorities due to incomplete or inadequate evidence development. The remand

rate for the service organizations was 15.1% (3,385 remands out of 22,382 claims).

If we examine the data for ~~the last seven~~^{Recent} Fiscal Years you will find that it is very similar. It indicates that insofar as service organization and private attorney/agent representation is concerned, the allowance rate is almost identical, with service organizations having a slightly higher allowance rate than private attorneys in two of the last seven Fiscal Years (the DAV had a higher allowance rate in three and an identical rate in two of the last seven Fiscal Years).

The remand rate - an indication of inadequate evidence development - was higher for private attorneys than service organizations in six of the last seven Fiscal Years.

This data certainly indicates that the VA claims representation provided by the service organizations is similar in quality to that provided by private attorneys. However, we contend that even this data is misleading and that, in fact, one can argue that service organizations provide superior VA representation.

It is important to note that the service organizations will take VA appellate action both on their own initiative and upon the request of claimants themselves - in the latter instance, this holds true regardless of an objective examination of the merits of the case. In other words, the service organizations do not refuse to represent a claimant no matter how bleak the prospects of securing a successful outcome may be.

Private attorneys, on the other hand, will "pick and choose", for an essential consideration in their decision to take a claim is the likelihood of securing a favorable outcome. If service organizations would be "selective" in the handling of appeals,

their win ratio would be much higher than is currently reflected in BVA statistical data. This contention is supported by data regarding the disposition of DAV initiated "Administrative Review Requests" to the VA's Central Office here in Washington, D.C.

An Administrative Review, while not considered an "appeal" in the normal VA sense of the term, can result in a Central Office decision that is binding on the local rating authority.

Administrative Review Requests are considered appropriate when the issue involves policy or procedure of more than local significance, or a question of inadequacy or misapplication of the law, regulations, the Rating Schedule, instructions, interpretations or precedents. Obviously, Administrative Review Requests are generated by the service organization representatives, rather than their VA claimants who are not versed in Title 38, U. S. Code or the Code of Federal Regulations which implements Title 38.

In the addendum to this statement you will find Administrative Review data applicable to the DAV. It indicates that when a service organization can be selective in choice of claims, there is a significant increase in the number of successful allowances (for example, the DAV Administrative Review win ratio in Fiscal Year 1977 and 1978 was 75% and 76%, respectively, of all claims presented).

In short, Mr. Chairman, in view of the existence of competent service organization representation, we feel a disservice would be done to the American taxpayer and to future VA beneficiaries if the Congress were to modify the current attorney fee limitation. For in essence it means that tax dollars appropriated by the Congress for the express purpose of providing direct monetary payments to service-connected disabled veterans, their dependents and survivors would be siphoned off into the payment of legal fees.

We also predict that if the Congress should allow private attorneys to enter VA proceedings at even the appellate level, in a very short period of time, with their eye on the enormous dollar amount of benefits that are annually awarded in pre-appellate proceedings, you will find American Bar Association witnesses petitioning this Committee for further fee modifications. In all likelihood, the ABA would claim that they must be in on the "ground level" in order to "properly develop" cases right from the benefit application stage. Who can say if a future Congress could resist such an argument?

One final point, there are those who would say, "If a veteran claimant, or the widow or child of a veteran, wishes to incur the expense of hiring a private attorney, then they should be allowed to do so. It is their decision."

We respectfully remind this Committee that it has a duty and an obligation to act in what it perceives to be the best interests of America's veteran population as a whole.

The basic question this Committee must ask and answer is, "Would all future claimants be best served by modification of the current fee limitation applicable to VA claims proceedings?"

We think not. For it is our considered opinion that, at best, private attorneys would only offer representation equal to that presently afforded by the veteran service organizations. At the other extreme, the representation offered by private attorneys would not be equal to that of the veterans organizations. In both cases, the veteran claimant would have to pay for this representation, good or bad.

As stated earlier, we agree that payment of reasonable legal fees for private attorney representation in any VA judicial review process the Congress may see fit to enact is appropriate. But we respectfully request that the current statute applicable to payment of legal fees in VA proceedings remain intact.

This completes my testimony Mr. Chairman. Thank you very much for your kind attention to the views I have expressed here today.

BOARD OF VETERANS APPEALS

REPRESENTATION IN APPEALED CASES

<u>FY 1972</u>	<u>TOTAL - %</u>		<u>ALLOWED - %</u>		<u>REMANDED - %</u>		<u>DENIED - %</u>		<u>OTHER - %</u>	
None	6,770	22.8	737	10.9	851	12.6	5,078	75.0	104	1.5
Nat'l Svc. Org.	22,382	75.3	2,923	13.1	3,385	15.1	15,881	71.0	193	0.9
Atty/Agents	571	1.9	74	13.0	88	15.4	400	70.0	9	1.6
TOTAL	29,723	100.0	3,734	12.5	4,324	14.6	21,359	71.9	306	1.0
<u>FY 1973</u>										
None	6,629	22.2	748	11.3	962	14.5	4,798	72.4	121	1.8
Nat'l Svc. Org.	22,561	75.6	3,306	14.7	3,826	17.0	15,272	67.7	157	0.7
Atty/Agents	635	2.1	85	13.4	140	22.0	390	61.4	20	3.2
TOTAL	29,825	100.0	4,139	13.9	4,928	16.5	20,460	68.6	298	1.0
<u>FY 1974</u>										
None	5,500	21.0	619	11.3	745	13.5	4,023	73.2	113	2.0
Nat'l Svc. Org.	20,145	76.9	2,968	14.7	3,340	16.6	13,693	68.0	144	0.7
Atty/Agents	564	2.1	94	16.7	105	18.6	347	61.5	18	3.2
TOTAL	26,209	100.0	3,681	14.0	4,190	16.0	18,063	68.9	275	1.1
<u>FY 1975</u>										
None	4,637	18.5	549	11.8	629	13.6	3,279	70.7	180	3.9
Nat'l Svc. Org.	19,783	79.0	3,056	15.4	3,260	16.5	13,233	66.9	234	1.2
Atty/Agents	607	2.4	100	16.5	102	16.8	395	65.1	10	1.6
TOTAL	25,027	100.0	3,705	14.8	3,991	15.9	16,907	67.6	424	1.7
<u>FY 1976</u>										
None	4,753	16.7	468	9.8	703	14.8	3,509	73.8	73	1.5
Nat'l Svc. Org.	23,063	81.0	3,064	13.3	3,951	17.1	15,959	69.2	89	0.4
Atty/Agents	666	2.3	90	13.5	105	15.8	465	69.8	6	0.2
TOTAL	28,482	100.0	3,622	12.7	4,759	16.7	19,933	70.0	168	0.6
<u>FY 1977</u>										
None	5,730	17.2	589	10.3	956	16.7	4,121	71.9	64	1.0
Nat'l Svc. Org.	26,827	80.6	3,547	13.2	4,120	15.4	18,678	69.6	82	0.3
Atty/Agents	739	2.2	98	13.3	144	19.5	493	66.7	4	0.5
TOTAL	33,296	100.0	4,234	12.7	5,220	15.7	23,292	71.1	150	0.5
<u>FY 1978</u>										
None	5,662	17.9	604	10.7	923	16.3	4,074	72.0	61	1.0
Nat'l Svc. Org.	29,264	82.1	3,756	12.8	3,726	12.7	21,674	74.1	108	0.4
Atty/Agents	708	2.0	96	13.6	123	17.4	484	68.8	5	0.7
TOTAL	35,634	100.0	4,456	12.5	4,772	13.4	26,232	73.6	174	0.5

DISABLED AMERICAN VETERANS

ADMINISTRATIVE REVIEWS

Number of Referrals from Field	1970-71	1971-72	1972-73	1974-75	1975-76	1976-77	1977-78
	<u>156</u>	<u>195</u>	<u>157</u>	<u>90</u>	<u>85</u>	<u>107</u>	<u>159</u>
Awaiting C File		15	14	0	23	22	30
No Action	58	93	81	59	27	40	55
Presented:							
Pending Decision	98	87	62	31	35	45	74
		4	5	0	0	8	7
Favorable	46	50	27	16	22	28	51
Denied	52	33	30	15	13	9	16
Percentage of Allowance	46.9%	60.2%	47.4%	51.6%	62.8%	75%	76%

BOARD OF VETERANS APPEALS
REPRESENTATION IN APPEALED CASES

	<u>AGGR - %</u>		<u>ALLOWED - %</u>		<u>REMANDED - %</u>		<u>DENIED - %</u>		<u>OTHER-%</u>	
<u>CY 1971</u>										
DAV	4,923	17.3	605	12.3	740	15.0	3,549	71.8	49	1.0
OTHERS *	23,663	82.8	2,674	11.3	3,316	14.0	17,419	73.6	234	1.0
TOTAL	28,586	100.0	3,279	11.5	4,056	14.2	20,968	73.2	283	1.0
<u>CY 1972</u>										
DAV	5,517	18.4	809	14.7	856	15.5	3,792	68.7	60	1.1
OTHERS *	24,544	81.6	3,262	13.3	3,750	15.3	17,277	70.4	255	1.0
TOTAL	30,061	100.0	4,071	13.5	4,606	15.3	21,069	70.1	315	1.1
<u>CY 1973</u>										
DAV	6,302	21.9	885	14.0	1,089	17.3	4,272	67.8	56	0.9
OTHERS *	22,538	78.1	3,113	13.8	3,691	16.4	15,496	68.6	238	1.1
TOTAL	28,840	100.0	3,998	13.9	4,780	16.6	19,768	68.5	294	1.0
<u>CY 1974</u>										
DAV	5,933	24.2	947	16.0	990	16.7	3,929	66.2	67	1.1
OTHERS *	18,564	75.8	2,718	14.6	2,890	15.6	12,661	68.2	295	1.6
TOTAL	24,497	100.0	3,665	15.0	3,880	15.8	16,590	67.7	262	1.3
<u>CY 1975</u>										
DAV	6,986	26.5	1,054	15.0	1,234	17.7	4,637	66.4	61	0.9
OTHERS *	19,393	73.5	2,594	13.4	3,193	16.4	13,381	69.0	225	1.2
TOTAL	26,379	100.0	3,648	13.8	4,427	16.8	18,018	68.3	286	1.1
<u>CY 1976</u>										
DAV	8,093	28.4	1,098	13.6	1,432	17.7	5,534	68.4	29	0.3
OTHERS *	20,389	71.6	2,537	12.4	3,346	16.4	14,429	70.8	141	0.7
TOTAL	28,482	100.0	3,635	12.7	4,778	16.8	19,963	70.0	170	0.5
<u>CY 1977</u>										
DAV	10,383	30.7	1,378	13.3	1,563	15.0	7,419	71.5	23	0.2
OTHERS *	23,424	69.3	2,921	12.5	3,421	14.9	16,889	72.1	133	0.6
TOTAL	33,807	100.0	4,299	12.7	5,044	14.9	24,308	71.9	156	0.5
<u>CY 1978</u>										
DAV	11,839	32.8	1,607	13.6	1,496	12.6	8,887	73.4	49	0.4
OTHERS *	24,274	67.2	2,986	12.3	3,367	13.9	17,764	73.2	157	0.6
TOTAL	36,113	100.0	4,593	12.7	4,863	13.5	26,451	73.3	206	0.5

*NOTE: "Others" includes all other service organizations, attorneys, agents and no representation.

July 15, 1981

Honorable Alan K. Simpson
Chairman, Veterans' Affairs Committee
United States Senate
Washington, D.C. 20510

Dear Senator Simpson:

It is our understanding that your Committee is scheduled to conduct hearings in mid-July on V.A. adjudication procedures, including the issue of whether 38 U.S.C. 4001(b) should be amended to exempt members of the Board of Veterans Appeals from those provisions of the Civil Service Reform Act of 1978, which pertain to the Senior Executive Service and the Merit Pay and Performance Appraisal Systems. We, the undersigned retired Board Members, respectfully request that this letter be made a part of the official hearing record.

We are proud to have served the Board for many years and our retirement has not lessened our strong interest in protecting the reputation and integrity of the Board. We are firmly convinced that the Board's highly prized decisional independence has been greatly compromised by the inclusion of the Chairman and Vice Chairman in the Senior Executive Service and the Chief Members in the Merit Pay and Performance Appraisal Systems.

We fully support the amendment to Title 38 proposed by our former colleagues. Since we are now retired and have nothing to gain one way or the other, we can state with a high degree of authority that it would be unfair and completely inaccurate to look upon the proposed amendment as an unwarranted attempt to evade needed supervisory control. On the contrary, in order to do the very best job for the veterans it serves, it is extremely important that the Board's decisional independence be carefully protected from all unnecessary encroachments.

Leonard Alford Joseph P. Hubert Sincerely, Philip M. Teeter
Edward L. Arpin Woodrow Morris C. Troiano
Charles K. Chaplin

This is not the complete list. Without exception these and other past members are in total agreement with the proposal. Some have sent their own copies of this letter. They were all outstanding "Judges" in their field and in my opinion the most impartial and knowledgeable individuals qualified to advise in this and related matters on the independence of the Board. I should also add that all ^{past} members of the Veterans Law Committee, Federal Bar Association favored the proposal from the beginning.

J. P. Hammond III
Past Chief member (Retired)
Past Chairman Veterans Law Committee F.B.A. (1970s)

1401 Hunting Ridge Road
Raleigh, N. C. 27609
July 23, 1981

The Honorable Alan K. Simpson
Chairman, Senate Veterans' Affairs Committee
Suite 410, Russell Senate Office Building
Washington, D. C. 20510

Dear Senator Simpson:

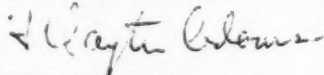
I have been made aware of the fact that your Committee has been conducting hearings relative to VA adjudication procedures, specifically including a proposal to exempt members of the Board Of Veterans Appeals from the Merit Pay and Performance Appraisal System.

As a former chief member of a section of the Board of Veterans Appeals and now an Administrative Law Judge, I wish to express my unqualified support of the proposed exclusion of Board Members from the Merit Pay System.

I am proud to have been at the Board for a period of approximately 10 years, the last three as a member. This controversy was brewing at the time I left the Board, and I feel now, as I did then, that the inclusion of any Board Members in the Merit Pay System would necessarily have a chilling effect upon desirable and necessary independence in decision making and, in fact, would appear to serve no other purpose.

It is requested my views be made a part of the official record.

Yours very truly



H. Clayton Adams

MORAN & CHAPLIN

~~1000 K STREET, N.W.~~
~~WASHINGTON, D.C. 20004~~
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~~1000 K STREET, N.W.~~

July 17, 1981

Hon. Allan K. Simpson
Chairman, Veteran's Affairs Comm.
United States Senate
Washington, D. C. 20510

Dear Senator Simpson,

I have just learned of the hearing held by your Committee in the matter of the classification and salary of Members of the Board of Veterans Appeals, particularly the Chief Members thereof.

In the way of background I was an employee of the Veterans Administration from 1945 to 1972, during which period I was an Associate Member of the Board of Veterans Appeals from 1957 and a Chief Member from 1960. In 1972 I became an Administrative Law Judge with the Occupational Safety and Health Review Commission and in 1974 I was designated its first Chief Administrative Law Judge. I retired from federal service in 1980, after 42 years continuous service. I believe this background gives me a unique blend of experience bearing on the issue of "command influence" as it affects this issue.

As long as I was associated with the Board of Veterans Appeals I was aware of instances of the Board's leadership or other senior officials attempting to influence the outcome of a particular issue before a section of three Associate Members. The degree of success that such efforts may have enjoyed in these instances would of course be directly related to the relationship between and character of the parties involved. The Veterans Administration recognized a similar problem when, in 1960, it removed the Board from a role it had formerly shared in the formulation of policy.

While I was an Administrative Law Judge I was able to participate in the latest attempt by the Congress to insulate an adjudicatory agency from the influence of an enforcement agency. When the Congress passed the Occupational Safety and Health Act of 1970 it provided for the first time that administrative rulings by Hearing Examiners (now Administrative Law Judges) under the OSH Act would be separated from the influence of the Secretary of Labor by placing adjudication in a separate Review Commission. During my approximately 8 years with the OSH Review Commission I did not detect any instances of attempts to influence the result of a dispute and the satisfaction of Congress with this solution to an age-old problem is manifest by its subsequent application to the Mine Safety and Health Act.

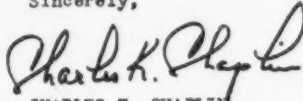
In view of this experience it is my strong recommendation that your committee not only consider giving Associate Members of the Board of Veterans Appeals a classification and status similar to that enjoyed by Administrative Law Judges, but that your investigation go further and conduct hearings leading to legislation creating an independent agency to adjudicate veteran's appeals. This, for the first time, would insure that veteran's appeals from

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adjudications by lower elements of the Veterans Administration would be protected by the insulation such an agency would enjoy from the budgetary constraints of the Veterans Administration or personal desires of senior management officials who control salary or reward determinations with respect to individual Associate Members. Veterans and the government are equally entitled to decisions based solely on the merits.

Sincerely,

A handwritten signature in cursive script, reading "Charles K. Chaplin". The signature is written in dark ink and is positioned above the typed name.

CHARLES K. CHAPLIN
2425 Lexington Road
Falls Church, Va. 22043

COMVETS
 Box 77
 Leeds, Mass 01053

Randall F Lepore
 Vice President, COMVETS
 PO Box 77
 Leeds, MA 01053
 October 8, 1981

Senator Alan Simpson
 Chairman Senate Veterans Affairs Committee
 410 Rayburn Bldg
 Washington, DC 20510

Dear Sir:

This letter is in reference to notifying before the committee you chair. COMVETS would like to be put on your mailing list so that we will be notified of hearings concerning veteran legislation.

It is our understanding that currently, Bill 19 concerning limited judicial review of Veterans Administration actions will be voted on shortly. I would like to make known to you at this time that our general membership is in favor of limited or unlimited judicial review of VA actions. We would also like to request that this matter be brought into the official proceedings so that our feelings on this matter are in the permanent record of your committee. It seems as though justice is not a benefit.

Yours truly in patriotism,

Randall Lepore

Randall Lepore

— The American Combat Veteran Organization —